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Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 312

**HARRY R. SWANSON, AS SECRETARY OF STATE
OF NEBRASKA, ET AL., APPELLANTS,**

vs.

**GENE BUCK, INDIVIDUALLY AND AS PRESIDENT
OF THE AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF NEBRASKA**

FILED AUGUST 4, 1940

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[Caption omitted]

[fol. 7]

**IN UNITED STATES DISTRICT COURT, DISTRICT OF
NEBRASKA, LINCOLN DIVISION**

Equity 5621

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, Complainants,

against

HARRY R. SWANSON, as Secretary of State of Nebraska, Walter H. Jensen, as State Treasurer of Nebraska, William H. Price, as Auditor of Public Accounts of Nebraska, Richard C. Hunter, as Attorney General for the State of Nebraska, James T. English, as County Attorney of Douglas County of Nebraska, Max G. Towle, as County Attorney of Lancaster County of Nebraska, Grace Ballard, as County Attorney of Washington County, of Nebraska, S. S. Diedrichs, as County Attorney of Lincoln County of Nebraska, Raymond B. Morrissey, as County Attorney of Johnson County of Nebraska, Maynard N. Grosshaus, as County Attorney of York County of Nebraska, Charles H. Hood, as County Attorney of Saunders County of Nebraska, Alvin B. Lee, as County Attorney of Valley County of Nebraska, Gerald J. McGinley, as County Attorney of Keith County of Nebraska, Floyd Lundberg, as County Attorney of Kearney County of Nebraska, Edwin Moran, as County Attorney of Otoe County of Nebraska, Rush C. Clarke, as County Attorney of Scotts Bluff County of Nebraska, "John Doe" and "Richard Roe", Defendants

BILL OF COMPLAINT—Filed June 7, 1937

Complainants, suing on behalf of themselves and others similarly situated bring this Bill of Complaint against the aforementioned defendants, and allege as follows:

1. The complainant, American Society of Composers, Authors and Publishers (hereinafter referred to, for brev-

ity's sake, as the "Society"), at all times hereinafter mentioned, was and still is an unincorporated association duly organized and existing under the laws of the State of New York, and has its principal place of business, in the Borough of Manhattan, City of New York, in the State of New York, in the Southern District of New York. The membership of the Society exceeds 1,000, and is comprised of authors, composers and publishers of musical works; said Society was organized and has been issuing licenses for the public performance for profit of musical compositions copyrighted by its members to users located throughout the United States, including the State of Nebraska, and said Society has protected the performing rights of musical works copyrighted by said members respectively, against infringement because of the public performance thereof for profit, and continues so to do.

2. Complainant, Gene Buck is President of said Society; because said membership, as is above indicated, is exceedingly numerous and it would be impracticable to join all the members of said Society as parties plaintiff, and as the issues and questions involved here are of common and general interest to all of the members of said Society, the said Society has duly authorized and empowered the said Gene Buck as President thereof to institute and prosecute this suit in its behalf, and this action is accordingly brought by Gene Buck as President, for and on behalf of said Society, as well as in his own individual right.

3. Complainant, Carl Fischer, Inc., is a corporation, duly organized and existing under and by virtue of laws of the State of New York, having its principal place of business in the City of New York in said State; complainant G. Schirmer, Inc., is a corporation, duly organized and existing under and by virtue of the laws of the State of New York, [fol. 9] having its principal place of business in the City of New York in said State; complainant, Irving Berlin, Inc., is a corporation, duly organized and existing under and by virtue of the laws of the State of New York, having its principal place of business in the City of New York in said State; all of said last mentioned complainants have been for upwards of twenty-five years and are presently engaged in the business of publishing musical compositions in the State of New York and elsewhere, and are hereinafter for brevity's sake referred to as "Publishers".

4. Complainant, Gene Buck, for upwards of twenty years has been and now is an author of lyrics of musical compositions; complainant, Deems Taylor, for upwards of fifteen years has been and now is a composer of musical and dramatico-musical works; complainant, Oley Speaks, for upwards of fifteen years has been and now is a composer of musical compositions; complainant, William J. Hill, for upwards of five years has been and now is a composer of musical compositions; complainant, Anne Paul Nevin, is the widow of Ethelbert Nevin, who was for more than twenty years a composer of musical compositions, and who departed this life in 1901; complainant, Ella Herbert Bartlett, is the daughter of Victor Herbert, who was for over twenty years a composer and who departed this life in the year 1924; complainant, Jane Sousa, is the widow of John Philip Sousa, who was for more than thirty years a composer and who departed this life in the year 1932; all of the complainants in this paragraph mentioned are citizens of the United States and all are residents and citizens of the State of New [fol. 10] York, and of the Southern District of New York, with the exception of Buck and Sousa, who are residents of the Eastern District of New York, and Nevin, who is a resident and citizen of the State of Maine.

5. Upon information and belief, the defendant, Harry R. Swanson, is the duly elected, appointed, qualified and acting Secretary of State of the State of Nebraska; the defendant, Walter H. Jensen, is the duly elected, appointed, qualified and acting State Treasurer of said State; the defendant, William H. Price, is the duly elected, appointed, qualified and acting Auditor of Public Accounts of said State; the defendant, Richard C. Hunter, is the duly elected, appointed, qualified and acting Attorney General of said State; the defendant, James T. English, is the duly elected, appointed, qualified and acting County Attorney of Douglas County in said State; the defendant, Max G. Towle, is the duly elected, appointed, qualified and acting County Attorney of Lancaster County in said State; the defendant, Grace Ballard, is the duly elected, appointed, qualified and acting County Attorney of Washington County in said State; the defendant, S. S. Diedrichs, is the duly elected, appointed, qualified and acting County Attorney of Lincoln County in said State; the defendant, Raymond B. Morrissey, is the duly elected, appointed, qualified and acting County Attorney of

Johnson County in said State; the defendant, Maynard N. Grosshaus, is the duly elected, appointed, qualified and acting County Attorney of York County in said State; the defendant, Charles H. Hood, is the duly elected, appointed, qualified and acting County Attorney of Saunders County in said State; the defendant, Alvin B. Lee, is the duly elected [fol. 11] qualified and acting County Attorney of Valley County in said State; the defendant, Gerald J. McGinley, is the duly elected, appointed, qualified and acting County Attorney of Keith County in said State; the defendant, Floyd Lundberg, is the duly elected, appointed, qualified and acting County Attorney of Kearney County in said State; the defendant, Edwin Moran, is the duly elected, appointed, qualified and acting County Attorney of Otoe County in said State; the defendant, Rush C. Clarke, is the duly elected, appointed, qualified and acting County Attorney of Scotts Bluff County in said State; and the defendants, "John Doe" and "Richard Roe", are the duly elected, appointed, qualified and acting officials of the State of Nebraska, whose names are at present unknown to complainants, who are also charged with the enforcement of Legislative Bill No. 478, enacted by the 52nd Session of the Legislature of Nebraska, and signed by the Governor of that State on May 17, 1937, and made effective immediately (such Statute being hereinafter referred to throughout as the "State Statute"), and each of said defendants is a citizen and resident of the State of Nebraska.

6. The value of the matter in dispute herein between complainants and defendants is in excess of the sum of \$3,000.00, exclusive of interest and costs.

7. This action is a suit in equity arising under the Constitution and laws of the United States, as will hereafter more particularly appear. Among other things, this suit is brought to repress and prevent the deprivation under color of the said Statute of certain rights, privileges and immunities secured to complainants by the Constitution and laws of the United States and the Constitution of the State of [fol. 12] Nebraska, that is, the right to have and enjoy exclusive rights under certain copyrights granted and owned by the respective complainants, other than the Society, as well as the exclusive right to publicly perform for profit such copyrighted musical compositions, which has been vested in the complainant Society for a limited period, as

hereinafter set forth, which rights have been respectively granted to the complainants pursuant to Article 1, Section 8 of the Constitution of the United States, and the Copyright Act of 1909 as amended (35 Stat. L. 1075-1078 U. S. Code, Title 17); to repress and prevent the deprivation of such rights without due process of law and without being denied the equal protection of the laws, and to repress and prevent the impairment of obligations of contracts heretofore made by the respective complainants and others similarly situated; to repress and prevent the operation and enforcement of the said State Statute as an ex post facto law, and to repress and prevent the interference by the State of Nebraska with the federal judicial power and the privileges of complainants as citizens of the United States by denying the complainants the right of access to the Federal Courts; to repress and prevent a compulsory, irrevocable grant of special privileges to the users of complainants' copyrighted music in the State of Nebraska in violation and disregard of complainants' rights; to repress and prevent the taking of complainants' property without just compensation and for a private purpose; to repress and prevent the enforcement of said State Statute as a special law granting to corporations, associations or individuals a special privilege and retroactive in its operations; and this suit, among other things, involves the question as to [fol. 13] whether or not each of the complainants may combine with a substantial number of other persons, corporations or associations for the purpose of licensing the public performance for profit of their copyrighted musical compositions without the State of Nebraska and without doing any act within the State of Nebraska; whether or not the complainants have the right to issue to citizens of Nebraska licenses for the public performance for profit of their copyrighted musical compositions copyrighted and owned by complainants, apart from the sale of copies of such compositions in the form of sheet music; whether the complainants have the right to act collectively in combination with a substantial number of persons, corporations or associations for the purpose of granting blanket licenses at fixed fees for the public performance for profit of the complainants' copyrighted musical compositions to users located within the State of Nebraska, or for the purpose of dividing among them the fees derived from the licensing of the right to publicly perform for profit their several

copyrighted musical compositions, or for the purpose of collecting or attempting to collect within the State of Nebraska license fees, fixed and determined, as aforesaid, for the right to publicly perform for profit the complainants' musical compositions within said State; whether the State of Nebraska has the right to declare by statutory enactment that the membership of a substantial number of authors, composers, proprietors, publishers, owners or their heirs, successors or assigns of copyrighted musical compositions in any society, association, club, firm, membership, corporation, group or entity (the complainants other than the Society now being members of the complainant [fol. 14] Society together with more than 1,000 others similarly situated), shall be prima facie evidence against complainants of the existence of a combination made unlawful by the State Statute; whether the State of Nebraska has the right to require and compel complainants to fix a price for the public performance for profit or other use of their copyrighted musical compositions and to affix such price to the copies of such musical compositions in the form of sheet music, and to include in the selling price of said sheet of music the price for the public performance for profit or other use of such copyrighted musical compositions; whether the State of Nebraska has the right to compel complainants, whether acting individually or collectively, to file in the office of the Secretary of State a copy of each of their respective copyrighted compositions with a fee of 25¢ with each copy of said composition before selling or disposing of any such composition in the State of Nebraska, upon which composition shall be affixed over the respective signatures of such complainants a statement to the effect that he or it controls the sale or disposition of such composition; whether the State of Nebraska has the right to declare void and unenforcible all existing contracts, agreements, licenses and arrangements made by complainants with or granted to users in the State of Nebraska; whether the State of Nebraska may impose a penalty upon complainants for collecting or attempting to collect the moneys due them under said existing contracts; whether the State of Nebraska has the right to grant to owners, lessees, operators or managers of radio broadcasting, radio receiving or radio rebroadcasting stations within that State, the right to [fol. 15] receive, broadcast and rebroadcast complainants' copyrighted musical compositions within said State with-

out the payment to complainants of any license fee or other compensation for such use; whether the State of Nebraska has the right to grant to owners, lessees, operators or managers of any theatre, moving picture house or similar place for amusement and public performance within Nebraska, the right to receive, use and render or cause to be received, used or rendered within Nebraska the copyrighted musical compositions of the combinations declared unlawful by said Statute, including the musical compositions of complainants, without the payment to complainants of any license fee or other compensation for such use; whether the State of Nebraska has the right to prevent the complainants from suing users in Nebraska for infringement of their respective copyrighted musical compositions or for loss or damage within Nebraska for the use or rendition, including the public performance for profit, of their respective copyrighted musical compositions originating or emanating from outside the State of Nebraska and performed, rendered or otherwise used within said State; whether the State of Nebraska has the right to subject complainants and others similarly situated to the jurisdiction of the Courts of Nebraska, by providing that any representative of any combination declared to be unlawful under said State Statute shall be deemed an official representative and agent of such combination and shall be construed to be doing business within Nebraska, and that service of any process may be had against complainants and others similarly situated by service upon said representative or the agent of [fol. 16] any such representative, with the same force and effect as if service were made upon the duly elected officer or acting agent or other official representative; whether the State of Nebraska may prevent complainants from engaging an agent in said State, by enacting that any such agent shall be subject to the penal provisions of the said State Statute; whether the State of Nebraska may dissolve the Society, which is organized under the laws of the State of New York and has its principal place of business therein, by an action brought within the State of Nebraska for committing any of the acts specified in said Statute to be in violation thereof upon service secured by service upon any representative that the Society may have within said State; whether the State of Nebraska may in a suit brought for the dissolution of the Society, or other civil suit, adjudicate the ownership of any copyrighted musical compositions

owned by the respective members of the said Society, including the other complainants, under which the Society has been granted the exclusive right of public performance for profit for a limited period, and whether the Courts of Nebraska may in such proceeding adjust, determine and adjudicate all rights for or against the person, firm or corporation, including complainants and others similarly situated whom the Court shall finally determine to be the owner or proprietor of such copyrighted musical composition, and whether the State of Nebraska may debar complainants from suing for damages or infringement in any Court other than the Court in which said dissolution or other civil suit is pending; whether the State of Nebraska may require the complainants and others similarly situated under penalty [fol. 17] of being held in contempt of Court and being fined \$100.00 for every day that they shall fail or refuse to furnish such documents, to file with the Clerk of the Court in which any civil or criminal action or proceeding is pending against complainants, or others similarly situated, exact copies of all documentary evidence, facts, figures, records or data in the possession or under the control of complainants and others similarly situated (being defendants in such suit or proceeding) pertaining to the issues in said action; whether said State Statute is sufficiently definite to apprise complainants of the acts for which they may be subjected to the penal provisions of said State Statute, including, fine, imprisonment, contempt and penalties therein provided for, and whether or not the defendants, in threatening to enforce the provisions of said State Statute against complainants are not depriving the complainants of their property and their right to liberty without due process of law, and whether they are not denying the complainants the equal protection of the laws; whether the State of Nebraska may compel complainants and others similarly situated to be witnesses against themselves and be subjected to unlawful search and seizure, and whether the State of Nebraska may impose conditions upon the enjoyment of copyright in the United States by the 44,000 members of foreign societies, who have authorized the Society to grant blanket licenses in the United States on their behalf, which conditions are not embraced in, but are in conflict with existing Treaties, Presidential Proclamations, and the Copyright Act of the United States.

[fol. 18] This suit is brought to repress and prevent de-

endants from proceeding under and by virtue of the provisions of said State Statute, and from illegally and unlawfully threatening complainants and their employees, representatives and agents with fine, arrest, imprisonment and penalties under the color of said State Statute.

8. The Publishers, in furtherance of their business of publishing musical compositions, acquired from writers and composers the right to publish musical compositions written and composed by such writers and composers, respectively, either by outright purchases of such rights or upon a royalty basis; and in the great majority of cases, complainants acquired from such writers and composers the right to secure copyright in the compositions purchased by Publishers; when such compositions are published by Publishers, two of the best copies thereof are deposited with the Register of Copyrights at Washington, D. C., and the required fee paid to him with a claim for copyright registration, and said compositions are always registered for copyright with the Register of Copyrights in Washington, D. C., pursuant to the provisions of the Copyright Act of 1909 (hereinafter referred to, as the "Copyright Act"), and on each and every one of the compositions published by publishers there appears upon the first page of music at the foot thereof, the copyright notice prescribed by said Copyright Act; that each of the Publishers in the course of its many years of conducting its respective business, has registered many thousands of compositions with the Register of Copyrights, and each has secured for its respective corporation the ownership of the copyright in many thousands [fol. 19] of musical compositions; that in the music business or trade the totality of copyrights of a particular publisher is known as its "catalogue"; that the great majority of each Publisher's respective catalogue is likewise copyrighted in foreign countries, as well, and copyright protection is obtained by said publishers for their catalogues in almost every civilized country of the world; that none of the copyrights owned by the complainants has a situs within the State of Nebraska; that each publisher's business is extensive, and that the value of the copyrights owned by each publisher is in excess of \$1,000,000.00; that it is impossible at any given time to ascertain the names or addresses of the persons who at any time have had an interest in such respective copyrights; old copyrights expire

currently and are renewed, sometimes by the publisher and sometimes by the writer and composer, or such others as may be entitled to renewal under the Copyright Act, and new compositions are constantly being registered; the rights in the copyrights are manifold and are sub-divided as to locality, extent and term; in many cases certain rights are reserved to the author or composer and disposition thereof is not within the control or knowledge of the publisher complainant, and is not ascertainable; that each of the publisher complainants would be compelled to expend a sum in excess of \$25,000.00 for payment to investigators, lawyers, clerical help and other expenses, in an attempt to compile and formulate a list of their respective copyrights containing the data required by said State Statute.

9. Each of the publishers has secured copyright registration in many thousands of musical compositions of which copyrights each of said publishers is respectively the [fol. 20] proprietor; said copyrights have been secured in manner similar to that described hereinabove, and with respect to each of said copyrights, the publishers have respectively obtained copyright cards, and all such copyrights are on file in the office of the Register of Copyrights in Washington, D. C., as prescribed by Statute, and copies of such cards are not annexed hereto in order to avoid unduly encumbering this complaint, but reference is made hereto and the same are incorporated herein, and copies of said cards will be produced upon the trial of this case, if necessary.

10. Complainant Gene Buck wrote the lyrics of many musical compositions, for over twenty years last past, and from time to time he entered into contracts with various music publishers, pursuant to which such publishers duly secured copyright in such respective compositions by publication, deposit and registration of the works, as required by the Copyright Act; said copyrights expire by limitation of time at various dates in the future, and the complainant Buck is advised and verily believes, that he is entitled to secure a renewal of each such copyright for an additional period of twenty-eight years, in his own name and on his own behalf, in each of said works; in such renewals of copyright, complainant Buck will have all the rights that vested in the proprietor of the original copyrights; among such works are the following: "Tulip Time", "Hello Frisco", "Gar-

den of My Dreams", "No Foolin'", "The Love Boat", "Florida, The Moon and You"; for over fifteen years, complainant Buck wrote the words and lyrics for the Florenz Ziegfeld Follies, as well as the words and lyrics of other musical shows produced with great success; Buck's right [fol. 21] to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of \$100,000.; that as and when renewal rights accrue to said complainant in his respective copyrighted works, it is and will be impossible for him to determine and ascertain what licenses, grants or rights in the original work have been made or granted by the proprietor of the copyright for the original term of twenty-eight years in said work, or the locality, extent or duration of such grants or licenses, or the names and addresses of such licensees or grantees who have acquired rights in said respective works from the proprietor of the original term of copyright.

11. Complainant Deems Taylor composed the music for two musical compositions entitled "Banks O' Doon" and "Captain Stratton's Fancy", in 1923, and entered into a contract for the publication of said compositions with J. Fischer & Bro., a music publisher; a copy of said contract is hereto annexed and marked Exhibit "A"; said publisher secured copyright of said compositions by publication and deposit of the work, as required by the Copyright Act, in and about the year 1923, and said copyrights expire by limitation of time in the year 1951, and complainant Taylor is advised and verily believes, that he is entitled to secure a renewal of said copyrights for an additional period of twenty-eight years in his own name and on his own behalf; in such renewals of copyrights, complainant Taylor will have all the rights that vested in the proprietor of the original copyrights; the complainant Taylor has composed the music for a great many other works, among [fol. 22] them "The King's Henchman", "Peter Ibbetsen" and "Through A Looking Glass Suite"; "Peter Ibbetson" has been successfully produced at the Metropolitan Opera House in the City of New York; Taylor's right to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of \$100,000.; that as and when renewal rights accrue to said complainant in his respective copyrighted works,

it is and will be impossible for him to determine and ascertain what licenses, grants or rights in the original work have been made or granted by the proprietor of the copyright for the original term of twenty-eight years in said work, or the locality, extent or duration of such grants or licenses, or the names and addresses of such licensees or grantees who have acquired rights in said respective works from the proprietor of the original term of copyright. Under the said contract, Exhibit "A", and other contracts between complainant Taylor and his publisher, said complainant is entitled to receive a certain percentage of the market or retail price on every copy of sheet music sold by his publisher averaging about 10% thereof. Under the contract between complainant Taylor and the Society, complainant Taylor is entitled to such a portion of 50% of all royalties collected as the classification committee of the writer members of the Society allots to him; in other words, complainant Taylor receives approximately 50% of all moneys collected by the Society as royalties or license fees for the public performance for profit of his copyrighted musical compositions; if the said Statute be enforced, complainant Taylor will be entitled to receive only an average of 10% of the moneys paid to the publisher by users in [fol. 23] Nebraska publicly performing for profit his copyrighted musical compositions, and said Taylor will have no right to participate in said royalties in any other manner, or to license the right to publicly perform for profit on any other basis.

12. Complainant Oley Speaks composed the music for many musical compositions and entered into numerous contracts for the publication of said compositions with complainant G. Schirmer, Inc., a music publisher; said publisher secured copyrights in said compositions by publication, deposit and registration of the works, as required by the Copyright Act, and said copyrights will expire by limitation of time at various dates in the future, twenty-eight years from the respective dates of registration of said works; and complainant Speaks is advised and verily believes that he is entitled to secure renewals of said copyrights for an additional period of twenty-eight years respectively, in each one in his own name and on his own behalf; in such renewals of copyright complainant Speaks will have all the rights that vested in the proprietor of the

original copyrights; among the works composed by Speaks are the following: "Sylvia", "Road to Mandalay" and "Morning"; Speaks' right to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of \$100,000.; that as and when renewal rights accrue to said complainant in his respective copyrighted works, it is and will be impossible for him to determine and ascertain what licenses, grants or rights in the original work have been made or granted by the proprietor of the copyright for the [fol. 24] original term of twenty-eight years in said work, or the locality, extent or duration of such grants or licenses, or the names and addresses of such licensees or grantees who have acquired rights in said respective works from the proprietor of the original term of copyright. Under the contracts between complainant Speaks and his publishers, said complainant is entitled to receive a certain percentage of the market or retail price on every copy of sheet music sold by his publisher averaging about 10% thereof. Under the contract between complainant Speaks and the Society, complainant Speaks is entitled to such a portion of 50% of all royalties collected as the classification committee of the writer members of the Society allots to him; in other words, complainant Speaks receives approximately 50% of all moneys collected by the Society as royalties or license fees for the public performance for profit of his copyrighted musical compositions; if the said Statute be enforced, complainant Speaks will be entitled to receive only an average of 10% of the moneys paid to the publisher by users in Nebraska publicly performing for profit his copyrighted musical compositions, and said Speaks will have no right to participate in said royalties in any other manner, or to license the right to publicly perform for profit on any other basis.

13. Complainant Hill composes music, and he has entered into contracts for the publication of musical compositions composed by him with Shapiro, Bernstein & Co., a music publisher who has secured copyrights of said compositions by publication, deposit and registration of such works, as required by the Copyright Act, and said copyrights expire by limitation of time at various dates in the [fol. 25] future, twenty-eight years from the date of registration of such respective works, and the complainant Hill is advised and verily believes that he is entitled to secure

renewals of said copyright for an additional period of twenty-eight years in his own name and on his own behalf; in such renewals of copyright complainant Hill will have all the rights that vested in the proprietor of the original copyrights; the complainant Hill has composed the music for a great many works, among them "The Last Roundup", "Chapel in the Moonlight", "The Old Spinning Wheel", "Lights Out", "Wagon Wheels", "Empty Saddles", "The Glory of Love" and "Timber"; Hills' right to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of \$100,000.; that as and when renewal rights accrue to said complainant in his respective copyrighted works, it is and will be impossible for him to determine and ascertain what licenses, grants or rights in the original work have been made or granted by the proprietor of the copyright for the original term of twenty-eight years in said work, or the locality, extent or duration of such grants or licenses, or the names and addresses of such licensees or grantees who have acquired rights in said respective works from the proprietor of the original term of copyright. Under the contracts between complainant Hill and his publishers, said complainant is entitled to receive a certain royalty on every copy of sheet music sold by his publisher averaging about one and one-half cents on each such sale. Under the contract between complainant [fol. 26] Hill and the Society, complainant Hill is entitled to such a portion of 50% of all royalties collected as the classification committee of the writer members of the Society allots to him; in other words, complainant Hill receives approximately 50% of all moneys collected by the Society as royalties or license fees for the public performance for profit of his copyrighted musical compositions; if the said Statute be enforced, complainant Hill will be entitled to receive only an average of 6% of the moneys paid to the publisher by users in Nebraska publicly performing for profit his copyrighted musical compositions, since such sheets of music are ordinarily sold for about twenty-five cents; and said Hill will have no right to participate in said royalties in any other manner, or to license the right to publicly perform for profit on any other basis.

14. Complainant Anne Paul Nevin is the widow of Ethelbert Nevin, who wrote and composed, among others, the

following musical compositions which were duly published and copyrighted: "The Rosary", "Mighty Lak a Rose", "Venetian Suite" and "Narcissus", and she has obtained renewals of some of said compositions in her own name, and is advised and verily believes that she will be entitled under the copyright act to obtain renewals of all of such compositions as and when the original terms thereof expire, during her lifetime; Ella Herbert Bartlett is the daughter of Victor Herbert, the foremost composer in America, who wrote and composed, among others, the following works, all of which were duly registered for copyright: "Kiss Me Again", "Natoma", "Sweet Mystery of Life", "I'm Falling in Love With Someone", "Mlle. Modiste", "Red Mill", [fol. 27] "Naughty Marietta", "Irish Fantasy" and "Pan Americana"; she has renewed some of the works on which the original term of copyright has expired, and is advised and believes that she will be entitled to renew the other works as and when they expire; Jane Sousa is the widow of John Phillip Sousa, who wrote and composed a great many compositions, and who was known as the "March King"; among his compositions are the following: "Stars & Stripes Forever", "Adeste Fidelis", "Washington Post March" and "El Capitan"; said compositions were duly registered for copyright, and said complainant Jane Sousa has renewed some of said compositions, and is advised and believes that she will have the right to renew the other works as and when they expire; that the rights, which the complainants mention in this paragraph have, in the renewal of the works written and composed respectively by the husbands and father of said complainants, are of great value and are worth in excess of \$100,000. with respect to each of said complainants. Under their respective contracts with their publishers, said complainants are entitled to receive a certain percentage of the market or retail price on every copy of sheet music sold by their publishers averaging about 10% thereof. Under the respective contracts between said complainants and the Society, said complainants are entitled to such a portion of 50% of all royalties collected as the classification committee of the writer members of the Society allots to them; in other words, said complainants receive approximately 50% of all moneys collected by the Society as royalties or license fees for the public performance for profit of their copyrighted [fol. 28] musical compositions; if the said Statute be en-

forced, said complainants will be entitled to receive only an average of 10% of the moneys paid to their respective publishers by users in Nebraska publicly performing for profit their respective copyrighted musical compositions, and said complainants will have no right to participate in said royalties in any other manner, or to license the right to publicly perform for profit on any other basis.

15. Prior to 1917, none of complainants, nor the respective husbands and father of complainants mentioned in the next preceding paragraph, received any compensation for the public performance for profit of the musical compositions respectively owned, published, copyrighted, written or composed by them; although the copyright Statute gave to the complainants the exclusive right to publicly perform for profit their respective musical compositions, users of musical compositions throughout the country refused to recognize such exclusive rights in complainants, and persistently and stubbornly refused to pay any royalties for such public performance for profit, but, on the contrary, users of music throughout the country publicly performed for profit the musical compositions owned, written and composed by complainants respectively, without payment of any royalties; complainants and others similarly situated were unable to enforce their exclusive rights in the public performance for profit of their compositions; individually they had no means of enforcing such rights; they could not employ investigators throughout the country to detect infringement because such public performances for profit were fugitive, fleeting and ephemeral, and no record [fol. 29] was made by users of such performances; complainants had no effective means of employing lawyers throughout the United States to bring infringement suits against users for the wrongful public performance for profit of their musical compositions; and complainants and others similarly situated were helpless to enforce the rights granted to them by the Copyright Act; those of the users of music who might be willing or inclined to pay for the public performance for profit of the compositions of complainants and those similarly situated, were unable to do so because it was necessary to have ready access to a great number of musical compositions to be performed in a single evening and at a moment's notice; under such circumstances it was impossible to get in touch with the indi-

vidual owners of the particular musical compositions, many of whom were scattered throughout the world; the users of music, consisting primarily of hotel owners, innkeepers, carabet and dance hall proprietors and motion picture exhibitors were organized into very powerful trade associations who employed counsel to defend such users against claims of infringement for the unauthorized performance of public performance of musical works of complainants, and others similarly situated, and such associations of users even offered to defend infringers who were not members of their respective associations.

16. On February 13, 1914, a small group of composers, authors and publishers, under the leadership of Victor Herbert, Irving Berlin, Silvio Hein, William Jerome, Gustav Kerker, John Golden, Glen McDonough, Ernest R. [fol. 30] Ball, Raymond Hubbell, James Weldon Johnson, Louis A. Hirsch, Henry Blossom, George Maxwell, Jay Witmark, the complainant Gene Buck and the complainant publisher Irving Berlin, Inc., and others, organized a voluntary unincorporated non-profit association under the laws of the State of New York, which they designated as the American Society of Composers, Authors and Publishers (hereinafter referred to for brevity's sake as the "Society"); said Society was formed for the purpose of licensing to users of music throughout the country the right to publicly perform for profit the works of its members; said Society did not and does not deal in any commodity, did not and does not deal in any sheet music, exercised and exercises no function with respect to mechanical rights of reproduction, and was and is limited solely as aforesaid to the right of public performance for profit; said Society has functioned continuously since said date; from its very commencement it encountered tremendous opposition on the part of organized groups of users of music throughout the country; one of the functions of the Society was to detect infringements of the right of public performance for profit of its members and to institute suits on behalf of its members for such infringements; it also licensed establishments throughout the country to publicly perform for profit the musical compositions of its members upon fair and reasonable license fees; the organized groups of users of music resisted efforts to compel them to pay compensation for the performance for profit of the Society's

members; with the advent of radio broadcasting in 1922, powerful groups of radio broadcasters throughout the [fol. 31] United States joined with the other groups, aforementioned, in opposing the Society; such groups of users attacked the Society by interposing defenses in suits for infringement, by complaints made to the Attorney-General of the United States, by a suit brought against the Society in the State of New York, by attempts made annually in Congress for over twelve years last past to amend the Copyright Act so as to permit the users of music to publicly perform for profit the musical compositions of the Society's members without compensation, by initiating tax legislation in various States, and lately by introducing into various States bills similar to the Statute of the State of Nebraska herein complained of, with a view of destroying and nullifying the rights of the Society's members given to them by the Copyright Act.

17. At the present time there are approximately 123 publisher members of the Society; there are approximately 1000 writer and composer members of the Society; from time to time said publisher, writer and composer members have entered into contracts with the Society, wherein and whereby said members of the Society have assigned to the Society the exclusive right of public performance for profit in their respective musical compositions for periods of five years at a time; the last contracts were signed prior to and became operative January 1, 1936; annexed hereto and made part of this complaint is the contract entered into on the 12th day of April, 1935 between complainant Carl Fischer, Inc. and the Society and marked Exhibit "B"; annexed hereto and made part of this complaint is the contract entered into on the 25th day of June, 1935 between [fol. 32] complainant Gene Buck and the Society and marked Exhibit "C"; the other complainants, G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, prior to January 1, 1936, executed and delivered to the Society contracts in form similar to the contracts entered into between the Society and Carl Fischer, Inc. and Gene Buck; all of said contracts executed and delivered by the complainants to the Society expire by limitation of time on the 31st day of December, 1940; all of the publisher members of the Society have executed contracts similar to

Exhibit "B"; all of the other members of the Society have executed contracts similar to Exhibit "C".

18. Annexed hereto and made a part of this complaint and marked Exhibit "D" are the present Articles of Association of the Society.

19. Complainants' respective businesses and occupations are lawful ones, and the pursuit thereof cannot be prohibited directly or indirectly; the rights vested in the complainants by the Constitution of the United States and the Copyright Laws enacted by the Congress thereunder are exclusive and cannot be limited, curtailed, forfeited, confiscated or circumscribed by any of the Statutes of the several States, including the State of Nebraska.

20. The users of music have uniformly objected to dealing with individual copyright owners for the licensing of the public performance for profit of particular musical compositions; the practice of the Society has been to license theatres according to their seating capacity, radio broadcasting stations according to their income, power and cover- [fol. 33] age, and hotels, cabarets and dance halls according to the respective size, business done, number and size of orchestras, methods of performance, income and standing; licenses are granted by the Society to such users in which all the musical compositions owned, written, and composed by members of the Society are made available to such users for use at any time within the contract period without requiring the specific consent of the owner of the particular composition played; such licenses include likewise the right on the part of the users to publicly perform for profit the musical compositions copyrighted, written and composed by members of societies throughout the world organized on a basis similar to the Society with whom Society has contracts, so that by licenses made with the Society the users obtain the right to publicly perform for profit the works of over 44,000 composers, authors and publishers; said rights granted by the Society are of great value to the users who have consistently and uniformly objected to the separate licensing of individual compositions, on the ground that it would involve a great amount of bookkeeping, clerical hire and expense; the system of blanket licenses conferred by the Society performs a useful service for the users and enables them to have available

at all times for their own special purposes a vast reservoir of musical compositions that are pleasing and entertaining to the public, classical, modern, as well as popular; and the Society since 1914 has looked after the interests not only of its own members, but of other members of the musical profession who have been in distress by reason of age and indigence and who otherwise have been unable to support [fol. 34] themselves, and the Society has paid sick benefits to such individuals, as well as to its members, and has looked after the widows and orphans of indigent composers and writers throughout the United States whose families would otherwise have been objects of public charity; the individual complainants herein have neither the resources, funds, organization or ability to protect the musical copyrighted works in which they are authors and composers, or which they own, or in which they have renewal rights, or obtain renewals, against infringement by unauthorized performances for profit within the State of Nebraska in their individual capacity; and have been compelled, as aforesaid, to unite and combine for the purpose of preventing such infringement and enforcing the rights granted to them under the Copyright Act, and such rights cannot be enforced by said individual complainants without such combination; if the individual complainants were to create an agency within the State of Nebraska to protect against infringement of their respective musical copyrights by unauthorized public performances for profit and to issue licenses thereunder to users in the State of Nebraska and check up on the accuracy of uses reported, the cost thereof to each of such individual complainants would be greatly in excess of \$10,000 a piece, which expenditure would be necessary in the employment of investigators, clerical help, accountants and lawyers.

21. Upon information and belief the State Statute was sponsored by an organized group of radio broadcasters and other users of music in an endeavor to destroy the Society so that they might have for their own selfish aggrandizement free access to all musical compositions without compensation; [fol. 35] said group of users caused a similar statute to be enacted by the State of Montana in or about February, 1937, known as Chapter 90 of the Laws of 1937 of the State of Montana; and they caused to be enacted in the State of Washington in or about March, 1937, a similar

statute known as Chapter 218 of the Laws of 1937 of the State of Washington; and similar bills have been prepared by such group of users who have circularized the legislatures of other States with a view to presenting to them for enactment similar statutes in all the forty-eight States; said State Statute was passed by the legislature of the State of Nebraska (as were the similar bills passed by the legislatures of the States of Montana and Washington) without an adequate opportunity for a hearing being afforded to complainants and others similarly situated. The following radio broadcasting stations in the State of Nebraska are members of the National Association of Broadcasters, which association on behalf of its members, for many years last past has acted and presently acts collectively in dealing with the Society, as well as for other purposes:

Station	Owner	Location
KMMJ.....	KMMJ, Inc.....	Clay Center
KGFW.....	Central Nebraska Broadcasting Corp.....	Kerney
KFAB.....	KFAB Broadcasting Company.....	Lincoln
KFOR.....	Cornbelt Broadcasting Corp.....	Lincoln
WJAG.....	Norfolk Daily News.....	Norfolk
KOIL.....	Central States Broadcasting Co.....	Omaha
WAAW.....	Omaha Grain Exchange.....	Omaha
WOW.....	Woodman of the World Life Insurance Association.....	Omaha

22. Annexed hereto and made a part of this complaint is a copy of the State Statute marked Exhibit "E".

[fol. 36] 23. Upon information and belief, the Society pursuant to the rights vested in it by the contracts made with complainants herein, and others similarly situated, has for many years entered into numerous contracts which are now in force between it, acting on behalf of and jointly for all the members of Society and for the joint benefit of all such members, and users of music within the State of Nebraska, in which the Society has licensed such users to publicly perform for profit the musical compositions of its members; there are about 391 contracts in force at the present time from which the Society received for the year 1936 the sum of \$53,984.33; on or about the 20th day of January, 1936, the Society entered into a contract with Omaha Grain Exchange, proprietor of a radio broadcasting station having call letters WAAW, a copy of which is hereto annexed and made a part hereof and marked Exhibit "F", which contract is presently in force and effect, and has been duly performed both by the Society and by the radio broad-

casting station; in addition to said contract, there are 8 other contracts made between the Society and the radio broadcasters in the State of Nebraska similar to Exhibit "F" presently in force and up to the enactment of said State Statute performed both by the Society and each respective broadcaster; on or about the 19th day of June, 1936, the Society entered into a contract with Ralph D. Goldberg Theatres Corporation, proprietor of a motion picture theatre known as the Military Theatre, Omaha, Nebraska, a copy of which is hereto annexed and made a part hereof and marked Exhibit "G", which contract is presently in force and effect, and was up to the enactment of said State Statute duly performed both by the Society and by the motion picture theatre exhibitor; in addition to said contract, there are 249 other contracts made between [fol. 37] the Society and the motion picture theatres in the State of Nebraska similar to Exhibit "G" presently in force and up to the enactment of said State Statute being performed both by the Society and each respective motion picture theatre exhibitor; on or about the 10th day of June, 1935, the Society entered into a contract with Fontenelle Hotel at Omaha, Nebraska, a copy of which is hereto annexed and made a part hereof and marked Exhibit "H", which contract is presently in force and effect, and was up to the enactment of said State Statute duly performed both by the Society and by the hotel owner; in addition to said contract, there are 23 other contracts made between the Society and hotels and restaurants in the State of Nebraska similar to Exhibit "H" presently in force and up to the enactment of said State Statute duly performed both by the Society and each respective hotel and restaurant proprietor.

24. Societies similar in purpose and scope to the Society have been in existence and are organized and operating under and by virtue of the laws of Argentina, Austria, Belgium, Brazil, Bulgaria, Czecho Slovakia, Denmark, England, Finland, France, Germany, Hungary, Italy, Jugoslavia, Norway, Portugal, Rumania, Spain, Sweden and Switzerland.

By virtue of various treaties and proclamations of the Presidents of the United States, issued pursuant to Section 8 of the Copyright Act, and which are now in force between the United States and Argentina, Austria, Belgium,

Brazil, Bulgaria, Czecho Slovakia, Denmark, England, Finland, France, Germany, Hungary, Italy, Jugoslavia, Norway, Portugal, Rumania, Spain, Sweden and Switzerland, reciprocal rights are granted to citizens of the United [fol. 38] States and to citizens of the foreign countries named, whereby the citizens of such foreign countries are extended copyright protection within the United States, upon compliance with the Copyright Act with respect to their several musical compositions, and citizens of the United States are extended reciprocal protection, with respect to their several musical compositions, under the copyright acts of said countries upon complying with the copyright acts thereof. Such reciprocal protection is based upon the determination that certain reciprocal conditions for the enjoyment of copyright exist as between the United States and such respective foreign states or nations, and is accorded under and by virtue of proclamations and treaties establishing the existence of such conditions, and having the force and effect of law.

Under mutual working arrangements with foreign societies, the Society has the exclusive right to and does license within the United States, the public performance for profit of the musical compositions copyrighted by all the members of said respective foreign societies, and said foreign societies have the exclusive right to, and do license within the territorial limits of their respective countries, the public performance for profit of the musical compositions copyrighted by members of the Society. Under such arrangements between the Society and said foreign societies, the latter are not required to, and never have, filed copies of the respective compositions copyrighted by their respective members. The catalogues of musical compositions of said foreign societies exceed many hundreds of thousands of compositions composed and written by more [fol. 39] than 44,000 members of such foreign societies, the exact number of compositions being utterly impossible to state at any one time on account of the expiration, renewal and obtaining of new copyrights. The right to perform the musical compositions embraced in said foreign catalogues are included in the blanket licenses issued to individual licensees by the Society in the United States. Their 44,000 members are scattered throughout the world, and they are not required to file copies of their respective musical compositions in order to enjoy copyright protection

in the United States under the Treaties, Proclamations and United States Laws aforesaid.

25. Upon information and belief, compliance with said State Statute would require the Society and its licensees to abandon the contracts between them and would compel each of the complainants, as well as other members of the Society, similarly situated, to rescind their respective contracts with the Society unless they were willing to have their works used for purposes of public performance for profit in Nebraska by any purchaser of a sheet of music, phonograph record, music roll, electrical transcription or film, who pays the price thereof fixed by the publisher of such composition or the manufacturer of such phonograph record, music roll, electrical transcription or film; under Section 1(e) of the Copyright Act of 1909, as amended, any manufacturer of parts of instruments serving to reproduce mechanically a musical work may manufacture such a reproduction of a copyrighted work upon payment to the copyright proprietor of a royalty of two cents on each such part manufactured, but the Copyright Act provides that the payment of such royalty shall not free such articles or devices from further payment of royalties in case public performances for profit are made by means of such articles [fol. 40] or devices; that many thousands of the copyrighted musical compositions owned and published by complainants, as well as others similarly situated, have been recorded by manufacturers of phonograph records, music rolls, electrical transcriptions and other parts of instruments serving to reproduce mechanically such copyrighted musical compositions; that the Copyright Act does not impose any other duty upon such manufacturers, except the payment of two cents for each record, and complainants have not received any other moneys except the payment of such two cents, and have no right to demand any further sums from such manufacturers; and complainants, and others similarly situated, have no control over the manner of sale and disposition of such phonograph records, music rolls or electrical transcriptions of their said copyrighted musical works, and they cannot compel the manufacturers thereof to affix any price upon said phonograph records, music rolls or electrical transcriptions, or to collect any price for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected for the public

performance for profit thereof. Complainants and others similarly situated are not willing to permit their musical compositions to be performed within the State of Nebraska publicly for profit upon such a basis or on any basis wherein the fee or compensation would be included in the price paid for a copy of the sheet of music of said composition or phonograph record, music roll, electrical transcription or film thereof; complainants believe that such a requirement and compulsory license would deprive them of the exclusive rights vouchsafed to them under the Copyright Law.

If each complainant would be required to act independently in order to have the right to fix license fees, each complainant would be required to have an investigator cover [fol. 41] ing each of the places of public entertainment and amusement in the State of Nebraska to determine whether any infringements took place and to determine whether payments were being made in accordance with performances; the establishment of such an agency would cost each of the complainants many thousands of dollars and would in fact greatly exceed the revenue which each of them might hope to collect in the State of Nebraska; all the users of music in the State of Nebraska paid for the music of the 44,000 composers represented by the Society and its affiliated societies for the year 1936, the aggregate sum of \$53,984.33. In the year 1936, users located in the following counties of the State of Nebraska paid to the Society for licenses to publicly perform for profit musical compositions of complainants and the other members of the Society and all other Societies throughout the world affiliated with the Society, the following sums:

County	Amount Collected	County	Amount Collected
Rock	\$26.25	Hooker	23.30
Morrill	60.00	Frontier	33.76
Kimball	25.00	Gasper	24.80
Richardson	204.39	Nance	74.70
Jefferson	149.50	Pawnee	38.76
Sheridan	140.10	Fillmore	\$89.75
Hitchcock	36.52	Wayne	64.90
Webster	30.00	Deuel	22.00
Phelps	123.01	Greeley	90.20
Madison	1623.57	Polk	98.54
Buffalo	789.94	Box Butte	20.00
Dixon	46.26	Thayer	47.00

County	Amount Collected	County	Amount Collected
Hall	526.41	Valley	95.00
Furnas	92.50	Nuckalls	39.60
Garden	35.00	Sherman	35.00
Douglas	22361.33	Kearney	41.52
Howard	55.11	Cass	164.43
Chase	51.25	Gage	270.90
Seward	77.57	Platte	252.49
Otoe	274.25	Pierce	101.65
Cuming	204.46	Adams	343.86
Stanton	22.40	Dundy	25.00
Dawson	139.90	Memaha	82.50
Hamilton	29.70	Johnson	52.50
Knox	170.65	Washington	73.40

[fol. 42]

Sarpy	57.01	Cedar	\$93.08
Webster	11.00	Dodge	306.59
Antelope	56.80	Butler	91.50
Cherry	87.50	Redwillow	152.12
Colfax	198.24	Dawes	203.15
Burt	202.56	Boyd	33.80
Franklin	7.50	Brown	30.56
Lancaster	14435.55	Garfield	22.50
Dakota	125.00	Keith	105.00
Cheyenne	119.38	Blaine	30.00
Scotts Bluff	1164.21	Wheeler	7.50
Clay	3488.60	Thomas	6.00
Custer	79.50	Perkins	54.20
Saline	177.50	Harlan	30.00
Boone	81.92	York	1512.68
Saunders	73.50	Thurston	19.00
Keyapaka	10.00	Holt	113.45
Lincoln	1164.08	Merrick	132.72

Total \$53,984.33

The proportion collected from each county represents the approximate proportions that were collected from each county for other years prior to 1936, and similar sums will be collected in the same proportion in the future unless prevented by the operation of the said State Statute.

27. Complainants will be able to license users of their music in the State of Nebraska without doing any act in

said State, but unless the injunction prayed for herein is granted, complainants will be unable to issue any licenses from without the State of Nebraska without incurring the penalties of said State Statute. The copyrighted works of the complainants and of all the other members of the Society and of the affiliated societies have at one time or another been publicly performed for profit in the State of Nebraska, and a great number of the copyrighted works of the complainants are being constantly performed in the State of Nebraska, and will continue to be performed in the State of Nebraska.

[fol. 43] 28. Radio broadcasting stations WOW and KOIL located in Omaha, Nebraska, are affiliated with and rebroadcast programs emanating from the studios of the National Broadcasting Company in New York City, New York. Station KFAB located in Lincoln, Nebraska, is affiliated with and rebroadcasts programs emanating from the studios of the Columbia Broadcasting System, Inc. Station KFOR located in Lincoln, Nebraska, and Station KOIL, located in Omaha, Nebraska, are affiliated with and rebroadcast programs emanating from the studios of the Mutual Broadcasting System in Newark, New Jersey. The following stations: Station KGFW in Kearney, and Station KGKY in Scotts Bluff, are affiliated with the National Independent Broadcasters, Inc., having its general sales office at 17 East 42nd Street, New York City, and rebroadcast programs emanate from studios located throughout the United States. It is a general practice with respect to national networks to have musical programs performed in the City of New York and in other large cities and broadcast from the radio station where such program is performed. At the same time the program is transmitted by telephone wires to other stations located throughout the country, and particularly the aforementioned broadcasting stations located within the State of Nebraska, so that the broadcast originating in the home studio of the National Broadcasting Company or of the Columbia Broadcasting Company or of the National Independent Broadcasters, Inc., or of the Mutual Broadcasting System, as the case may be, is simultaneously performed by means of a broadcast from the connecting stations, including the above mentioned stations within the State of [fol. 44] Nebraska; the programs broadcast by many stations outside of the State of Nebraska, whether affiliated or

not with any station located within the State of Nebraska are heard within the State of Nebraska, and such programs include the broadcasting of music copyrighted by the members of the Society, including the complainants herein; broadcasting stations without the State of Nebraska broadcast daily in excess of 100 copyrighted works of the complainants and other members of the Society and of its affiliated societies, which broadcasts are heard on receiving sets within the State of Nebraska.

29. The said State Statute prevents complainants from licensing the broadcasting of their compositions outside of the State of Nebraska if such broadcast may be heard within the State of Nebraska; said State Statute deprives complainants of the means of detecting infringements in the State of Nebraska; said State Statute attempts to deprive complainants of unrestricted access to the Federal Court for redress for infringement of their copyrights; said State Statute sets up a system of recording of copyrights in addition to that provided for by the Copyright Act; unless the enforcement of this State Statute is restrained by this Court, other States in addition to Montana and Washington may enact similar Statutes requiring complainants to comply not only with the recording requirements enacted in this State, but also in all the forty-eight States, all of which would work undue hardship on complainants and would violate the spirit of the Constitution and the Copyright Laws enacted thereunder.

30. Upon information and belief said State Statute is class legislation; it is aimed only at proprietors of musical copyrights and no other copyrights, and it exempts [fol. 45] the performance of musical works which are not copyrighted under the laws of the United States but which are protected at common law. A great many forms of copyright and kinds of copyrighted works are presently and constantly dealt in, licensed, sold and otherwise made available within the State of Nebraska, such as motion pictures, dramas, newspapers, magazines, books and periodicals, none of which are affected by said State Statute.

31. Said State Statute attempts to vest in the Courts of Nebraska the right to determine the ownership of complainants' copyrights and to construe, interpret, modify, rescind or annul contracts between complainants and users in the

State of Nebraska without properly securing jurisdiction over complainants and others similarly situated, who are not residents or domiciled within the State of Nebraska, and are not doing business therein, and who have no agency within said State and have no property within said State which may be seized.

32. The licensing of the right of public performance as provided for by the said State Statute of Nebraska involves only the incorporeal right secured under the Copyright Law, as distinguished from the material object copyrighted; complainants and the Society in licensing the public performance for profit do not furnish, supply or deliver any sheet music to users; they do not deal directly or indirectly with any tangible object or piece of property in connection with the licensing for public performance for profit of their copyrighted musical compositions.

33. Upon information and belief, the said State Statute [fol. 46] is a pretext under which the State of Nebraska is attempting to usurp power to enact copyright laws delegated by the Constitution of the United States solely to Congress, and said State Statute interferes with the copyrights of the complainants and others similarly situated under the guise of an exercise of the police power of said State; the said State Statute, in truth and in fact, was enacted, not in the public interest, but rather for the private benefit and gain of a group of users of music in an organized effort to enable such users to have free access to the copyrighted works of complainants and others similarly situated, without paying compensation therefor, and without danger of being compelled to pay damages for infringement as provided for in the Copyright Act.

34. The system of licensing provided for in said State Statute would deprive complainants and others similarly situated of the right to enter into voluntary contracts licensing the public performance for profit of their copyrighted musical works, and of the right to determine the conditions under which such works might be performed, and of the right to limit the frequency of the performance of such works in order to prevent the destruction of the performing right values thereof.

35. The defendants, Harry R. Swanson, as Secretary of the State of Nebraska, Walter H. Jensen, as State Treas-

urer of the State of Nebraska, William H. Price, as Auditor of Public Accounts of the State of Nebraska, Richard [fol. 47] C. Hunter, as Attorney General of the State of Nebraska, James T. English, as County Attorney of Douglas County, State of Nebraska, Max G. Towle, as County Attorney of Lancaster County, State of Nebraska, Grace Ballard, as County Attorney of Washington County, State of Nebraska, S. S. Diedrichs, as County Attorney of Lincoln County, State of Nebraska, Raymond B. Morrissey, as County Attorney of Johnson County, State of Nebraska, Maynard N. Grosshaus, as County Attorney of York County, State of Nebraska, Charles H. Hood, as County Attorney of Saunders County, State of Nebraska, Alvin B. Lee, as County Attorney of Valley County, State of Nebraska, Gerald J. McGinley, as County Attorney of Keith County, State of Nebraska, Floyd Lundberg, as County Attorney of Kearney County, State of Nebraska, Edwin Moran, as County Attorney of Otoe County, State of Nebraska, Rush C. Clarke, as County Attorney of Scotts Bluff County, State of Nebraska, and "John Doe" and "Richard Roe" have threatened to, and will enforce such State Statute in each and all of its terms and the whole thereof, and particularly against these complainants and others similarly situated, individually and as members of the Society, in the event that such complainants and others similarly situated refuse to file copies of their copyrighted musical works in the State of Nebraska; or to accept or submit to a system of involuntary licensing; and said defendants have threatened to enforce the penal and confiscatory provisions of such Statute against complainants and others similarly situated in the event complainants and others similarly situated attempt to enforce the existing contracts between themselves and the Society and between the Society and citizens and residents [fol. 48] of the State of Nebraska; or in the event that complainants and others similarly situated license persons, firms or corporations to publicly perform outside the State of Nebraska musical compositions, which performances may be reproduced and reperformed within the State of Nebraska; or in the event that complainants and others similarly situated enter into license agreements without the State of Nebraska with residents or citizens of that State for the right or license to perform publicly for profit the musical compositions of the complainants and others similarly situated within the State of Nebraska; or in the event

that complainants and others similarly situated enter into license agreements within the State of Nebraska with persons, firms or corporations, residents or citizens of that State, for the purpose of licensing them to publicly perform for profit the musical compositions of complainants and others similarly situated within or without the State of Nebraska; or in the event that complainants and others similarly situated take any means to detect infringements of their copyrighted musical works within the State of Nebraska; or in the event that complainants and others similarly situated bring any suits for infringement of their copyrights in their respective compositions by means of public performances for profit in the Federal Courts within or without the State of Nebraska; or in the event that complainants and others similarly situated, being non-residents and non-citizens of the State of Nebraska, and having no agent or representative and not transacting business within said State, or having property therein, fail or refuse to submit to the jurisdiction of the State Courts of Nebraska; and [fol. 49] defendants have threatened in the event of the aforesaid contingencies, or any of them, to enforce the penalties provided for in said State Statute, and to proceed to prosecute complainants and others similarly situated, their employees and agents, criminally, for an alleged violation of said Statute.

36. Said Statute is in its terms so drastic, and the penalties attached to the violation of the terms thereof are so great, that neither complainants nor others similarly situated may continue to grant licenses to users of music within the State of Nebraska or even to users of music without the State of Nebraska if the public performance for profit of such music may be reproduced or performed within the State of Nebraska. There are ninety-three counties in the State of Nebraska, in each of which there are establishments publicly performing for profit the copyrighted musical compositions of members of the Society, including the other complainants herein, and the foreign societies with which the Society has reciprocal arrangements, and if complainants attempt to issue licenses or collect from licensees or attempt to detect infringements of their copyrighted works in said counties they will be subjected to a multiplicity of suits and prosecutions unless restrained by this Honorable Court; complainants will be unable to secure any com-

compensation for the public performance for profit of their respective copyrighted musical compositions by means of re-broadcasting or by means of personal performance of artists, singers, musicians, orchestras, bands, actors, loud speakers, radio, sound production or reproduction, apparatus or instrumentalities or electrical transcriptions, or by [fol. 50] any other means of rendition whatsoever within the State of Nebraska from any radio broadcasting, radio receiving or radio rebroadcasting station, or in any theatre or motion picture house located in the State of Nebraska; complainants and others similarly situated will be unable to enforce any contracts made between them or on their behalf by the Society with residents or citizens of the State of Nebraska; complainants and others similarly situated, as well as the Society, have been compelled since the effective date of the Statute, to desist from licensing the public performance for profit of their copyrighted musical compositions in the State of Nebraska and have been deprived of all sources of revenue therefrom, and have been denied the privileges granted to them by the Copyright Act; and the Society has been compelled to desist from enforcing collection of payments under existing contracts between it and users since the effective date of said Statute, and has been compelled to desist from investigating infringements of the copyrights of complainants, and other members of the Society and its affiliated societies by means of the public performance for profit of their respective copyrighted musical compositions, and complainants will continue to suffer as aforesaid unless this Court grant an injunction as prayed for; and the complainants and the Society and its affiliated societies have been and will be hindered, delayed and impeded in enforcing their rights and remedies under the Copyright Act in the Federal Court located in the State of Nebraska, for infringements committed by users within the State of Nebraska by means of public performances for profit of the copyrighted musical compositions aforesaid, all because of the drastic provisions of the said State [fol. 51] Statute and the numerous penalties, civil and criminal, to which the complainants will be liable in the event of any violation of said State Statute; and complainants and others similarly situated will be unable to detect and sue for infringement of their copyrighted musical works within the State of Nebraska; unless this Court shall determine the validity and application of said Statute in this proceeding,

complainants and others similarly situated will be deprived of the rights granted to them under the United States Constitution and the Copyright Act, and will be without any remedy for the enforcement of such rights within the State of Nebraska, and they will therefore be deprived of their property and liberty without due process of law, and denied the equal protection of the laws, all in contravention of Article I, Sections 8, 9 and 10, Article III, Section 2, Article IV, Section 2, and Article VI, Section 2, of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States, and Article 1, Sections 1, 3, 7, 12, 13, 15, 16, 21, and 25, of the Constitution of the State of Nebraska; and complainants have no adequate remedy at law, and are relievable only in a court of equity and if complainants are not afforded the equitable relief prayed for herein, but are required to resist, when criminal prosecutions and other suits or proceedings are instituted under the State, it will result in such a multiplicity of suits and entail such delay and so jeopardize and injure complainants in their persons and property as to make the remedy at law grossly inadequate.

37. Each of the complainants has received from the Society for the year 1936, as compensation for the public [fol. 52] performance for profit of the complainants' works, respectively, in excess of the following sums: Carl Fischer, Inc. in excess of \$50,000.00; G. Schirmer, Inc. in excess of \$50,000.00; Irving Berlin, Inc. in excess of \$50,000.00; Gene Buck in excess of \$5,000.00; Deems Taylor in excess of \$5,000.00; Oley Speaks in excess of \$5,000.00; William J. Hill in excess of \$5,000.00; Anne Paul Nevin in excess of \$5,000.00; Ella Herbert Bartlett in excess of \$5,000.00; and Jane Sousa in excess of \$5,000.00; upon information and belief, complainants will be entitled to receive for the balance of the period for which they have entered into contracts with the Society, and for which the Society has contracts with users of music, similar amounts for each year, down to December 31, 1939, and such complainants will receive such amounts for said period if their right thereto is not interfered with and destroyed by such State Statute; approximately two-thirds of the revenue obtained by the Society and distributed to the complainants and others similarly situated, is derived from moneys paid for the right to perform publicly for profit by means of radio broadcast-

ing, and if this Court does not interfere and restrain the enforcement of such State Statute, such revenue may be lost to the Society, and the complainants and others similarly situated will not participate in royalties from the public performance for profit by means of radio broadcasting, because such performances, even though given in other parts of the United States, may, under the provisions of such State Statute, be deemed a violation of such State Statute in the State of Nebraska, and complainants will lose the benefit of their said contracts with the Society and all the contracts made between the Society and users of music, and will receive no further moneys from public performance for profit by means of radio broadcasting of their musical compositions.

38. Said State Statute is unconstitutional and void and each and every section thereof is unconstitutional and void under the aforesaid Articles and Sections of the Constitution of the United States mentioned hereinabove, and the Fourteenth Amendment to the Constitution of the United States, in that it deprives complainants of their liberty and property without due process of law and the equal protection of the laws, impairs the obligation of contract, destroys the rights of complainants in their copyrighted works, nullifies valid contracts theretofore entered into, interferes with the Federal judicial power, destroys the privileges and immunities granted to complainants, and attempts to subordinate the Federal Constitution, Treaties of the United States with foreign nations, Presidential Proclamations and the Copyright Act to the State of Nebraska, and to subordinate complainants to an unreasonable search and seizure of their properties, effects, papers and persons.

39. If defendants are not restricted in their threatened and attempted enforcement of such State Statute, complainants and others similarly situated will suffer great and irreparable loss, for which they have no adequate remedy at law, but are relievable only in a court of equity.

Therefore, the complainants pray:

1. That defendants, Harry R. Swanson, as Secretary of the State of Nebraska, Walter H. Jensen, as State Treasurer of the State of Nebraska, William H. Price, as Auditor of Public Accounts of the State of Nebraska, Richard C. Hun-

ter, as Attorney General of the State of Nebraska, James T. [fol. 54] English, as County Attorney of Douglas County, State of Nebraska, Max G. Towle, as County Attorney of Lancaster County, State of Nebraska, Grace Ballard, as County Attorney of Washington County, State of Nebraska, S. S. Diedrichs, as County Attorney of Lincoln County, State of Nebraska, Raymond B. Morrissey, as County Attorney of Johnson County, State of Nebraska, Maynard N. Grosshaus, as County Attorney of York County, State of Nebraska, Charles H. Hood, as County Attorney of Saunders County, State of Nebraska, Alvin B. Lee, as County Attorney of Valley County, State of Nebraska, Gerald J. McGinley, as County Attorney of Keith County, State of Nebraska, Floyd Lundberg, as County Attorney of Kearney County, State of Nebraska, Edwin Moran, as County Attorney of Otoe County, State of Nebraska, Rush C. Clarke, as County Attorney of Scotts Bluff County, State of Nebraska, "John Doe" and "Richard Roe", be enjoined and restrained by temporary and permanent order of injunction of this Court, from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, and proceeding at law or in equity for the purpose of enforcing said State Statute, against the complainants and others similarly situated, representatives, employees, agents or any of them, and from demanding that copies of musical compositions of complainants and others similarly situated be filed, and from attempting to appoint or take any steps leading to the appointment of a receiver, and from interfering with all existing contracts entered into between complainants and others, including the Society and citizens and residents of the State of Nebraska, and from threatening to enforce against any citizens or residents of the State of Nebraska, the penalties of said Statute in the event such citizens and [ols. 55-57] residents desire to carry out their contracts with Society or complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives or agents, or any of them, or others similarly situated, for doing any act or thing to detect infringement and to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Nebraska or elsewhere, and generally, from doing any act or thing to carry out or enforce any of the provisions of said State Statute; and that an order to show cause issue herein upon the application of the complainants, directed to the above-

named defendants, requiring them to show cause why a temporary injunction should not issue as prayed for herein.

2. That said State Statute, and each and every part and section thereof, be declared to be unconstitutional, illegal and void, and that a perpetual injunction be issued restraining the enforcement of said State Statute and each and every part and section thereof, as hereinabove prayed for.

3. That a writ of subpoena may issue to the defendants, requiring them to answer this bill of complaint fully and truthfully, but not on oath, an oath being hereby waived, and that further and general relief be granted as the nature of complainants' case may require, or to equity may seem just and proper.

L. J. TePoel, Solicitors for Complainants, Office &
P. O. Address, 605-8 Farnam Building, Omaha,
Nebraska.

Gene Buck.

(Duly verified)

[fol. 58]

EXHIBIT "A" TO COMPLAINT

No. 5242—5210

Agreement

between

J. Fischer & Bro. (Inc.), New York City, party of the first part, and Deems Taylor of New York City party of the second part:

I. J. Fischer & Bro. agree to publish Banks O'Doon—Captain Stratton's Fancy by Deems Taylor.

II. J. Fischer & Bro. agree to defray all expenses made necessary to produce printed copies of the first and all subsequent editions of the musical compositions mentioned in Article I.

III. Deems Taylor, party of the second part, or his assigns to receive in consideration of this agreement, ten per cent (10%) of the marked or retail price on every copy sold.

IV. In said J. Fischer & Bro., its successors or assigns, or legal representatives, shall be vested the exclusive right of copyrighting, publishing and vending the said musical compositions by Deems Taylor, party of the second part, or of making arrangements for so doing with its agents and representatives in all countries.

V. J. Fischer & Bro. agree to make settlement annually in the month of January as of January First.

VI. Copies of musical compositions mentioned in Article I are to be printed and placed on sale when J. Fischer & Bro. find it convenient so to do.

VII. It is further agreed that said Deems Taylor, party of the second part, shall forthwith sell, assign, transfer and turn over to J. Fischer & Bro., party of the first part, his copyright and all his title and interest in and rights under the same unto the said J. Fischer & Bro., for the consideration aforesaid.

VIII. In said J. Fischer & Bro., party of the first part, its successors or assigns, shall be vested the rights during the full life of copyright to authorize or permit the performance of the musical compositions mentioned in Article I.

In Witness Whereof the party of the first part has hereunto affixed its corporate seal and the party of the second part his hand and seal this Sixteenth day of March, 1923.

J. Fischer & Bro., by [Name illegible]; Deems Taylor (L. S.).

Witness: A. Schmitt, H. Roth.

[fol. 59]

EXHIBIT "B" TO COMPLAINT

Agreement made between the Undersigned (for brevity called "Owner") and the American Society of Composers, Authors and Publishers (for brevity called "Society"), in consideration of the premises and of the mutual covenants hereinafter contained, as follows:

The Owner sells, assigns, transfers and sets over unto the Society for the term hereof, the entire exclusive right of public performance (as hereinafter defined), in each musical work:

Of which the Owner is a copyright proprietor; or

Which the Owner, alone, or jointly, or in collaboration with others, wrote, composed, published, acquired or owned; or

In which the Owner now has any right, title, interest or control whatsoever, in whole or in part; or

Which hereafter, during the term hereof, may be written, composed, acquired, owned, published or copyrighted by the Owner, alone, jointly or in collaboration with others; or

In which the Owner may hereafter, during the term hereof, have any right, title, interest or control, whatsoever, in whole or in part.

The exclusive right of public performance in every musical work shall be deemed assigned to the Society by this instrument and shall vest in and be the absolute property of the Society for the term hereof, immediately, upon the work being written, composed, acquired, owned, published or copyrighted.

The rights hereby assigned shall include:

(a) All the rights and remedies for enforcing the copyright or copyrights of such musical works, whether such copyrights are in the name of the Owner and/or others, as well as the right to sue under such copyrights in the name of the Society and/or in the name of the Owner and/or others, to the end that the Society may effectively protect and be assured of all the rights hereby assigned.

(b) The exclusive right of public performance of the separate numbers, songs, fragments or arrangements, melodies or selections forming part or parts of musical plays and dramatico-musical compositions, the Owner reserving and excepting from this assignment the right of performance of musical plays and dramatico-musical compositions in their entirety, or any part of such plays or dramatico-musical compositions on the legitimate stage.

(c) The right of public performance by means of radio broadcasting, telephony, "wired wireless," all forms of synchronism with motion pictures, and/or any method of transmitting sound; Provided, however, that the Owner shall have the right, in good faith, by written notice to the Society, to restrict, limit or prohibit the public performance by radio broadcasting of works the copyright of which is vested in the Owner, and the Society agrees that all licenses

by it issued shall contain a provision reserving its right to restrict or limit, or to prohibit entirely, the performance by broadcasting of any works in its repertory; and Provided further, that if the Owner notify the Society in writing to restrict, limit or prohibit the public performance of such copyrighted work, the Owner shall not, by the service of such notice, become repossessed of any of the rights transferred to the Society by this assignment.

2. The term of this agreement shall be for a period of five (5) years from the first day of January, 1936, and expiring on the 31st day of December, 1940.

3. The Society agrees, during the term hereof, in good faith to use its best endeavors to promote and carry out the objects for which it was organized, and to hold and apply all royalties, profits, benefits and advantages arising from the exploitation of the rights assigned to it by its several members, including the Owner, to the uses and purposes as provided in its Articles of Association (to which reference is hereby made), as now in force or as hereafter amended.

4. The Owner hereby irrevocably, during the term hereof, authorizes, empowers and vests in the Society exclusively, the right to enforce and protect such rights of public performance under any and all copyrights, whether standing in the name of the Owner and/or others, in any and all works copyrighted by the Owner, and/or by others; to prevent the infringement thereof, to litigate, collect and receipt for damages arising from infringement, and in its sole judgment to join the Owner and/or others in whose names the copyright may stand, as parties plaintiff or defendants in suits or proceedings; to bring suit in the name of the Owner and/or in the name of the Society, or others in whose name the copyright may stand, or otherwise, and [fol. 60] to release, compromise, or refer to arbitration any actions, in the same manner and to the same extent and to all intents and purposes as the Owner might or could do, had this instrument not been made.

5. The Owner hereby makes, constitutes and appoints the Society, or its successor, the Owner's true and lawful attorney, irrevocably during the term hereof, and in the name of the Society or its successor, or in the name of the Owner, or otherwise, to do all acts, take all proceedings, execute,

acknowledge and deliver any and all instruments, papers, documents, process and pleadings that may be necessary, proper or expedient to restrain infringements and recover damages in respect to or for the infringement or other violation of the rights of public performance in such works, and to discontinue, compromise or refer to arbitration any such proceedings or actions, or to make any other disposition of the differences in relation to the premises.

6. The Owner agrees from time to time to execute, acknowledge and deliver to the Society, such assurances, powers of attorney or other authorizations or instruments as the Society may deem necessary or expedient to enable it to exercise, enjoy and enforce, in its own name or otherwise, all rights and remedies aforesaid.

7. It is mutually agreed that during the term hereof the Board of Directors of the Society shall be composed of an equal number of writers and publishers respectively, and that the royalties distributed by the Board of Directors shall be divided into two (2) equal sums and one (1) each of such sums credited respectively to and for division amongst (a) the writer members, and (b) the publisher members, in accordance with the system of distribution and classification as determined by the Classification Committee of each group, in accordance with the Articles of Association as they may be amended from time to time, except that the classification of the Owner within his class may be changed.

8. The Owner agrees that his classification in the Society as determined from time to time by the Classification Committee of his group and/or the Board of Directors of the Society, in case of appeal by him, shall be final, conclusive and binding upon him.

The Society shall have the right to transfer the right of review of any classification from the Board of Directors to any other agency or instrumentality that in its discretion and good judgment it deems best adapted to assuring to the Society's membership a just, fair, equitable and accurate classification.

The Society shall have the right to adopt from time to time such systems, means, methods and formulae for the establishment of a member's status in respect of classification as will assure a fair, just and equitable distribution of royalties among the membership.

9. "Public Performance" Defined. The term "public performance" shall be construed to mean vocal, instrumental and/or mechanical renditions and representations in any manner or by any method whatsoever, including transmissions by radio broadcasting stations, transmission by telephony and/or "wired wireless"; and/or reproductions of performances and renditions by means of devices for reproducing sound recorded in synchronism or timed relation with the taking of motion pictures.

10. "Musical Works" Defined. The phrase "musical works" shall be construed to mean musical compositions and dramatico-musical compositions, the words and music thereof, and the respective arrangements thereof, and the selections therefrom.

11. The powers, rights, authorities and privileges by this instrument vested in the Society, are deemed to include the World, provided, however, that such grant of rights for foreign countries shall be subject to any agreements now in effect, a list of which are noted on the reverse side hereof.

12*—As per rider below

Signed, Sealed and Delivered, on this 12th day of April, 1935. Carl Fischer Inc., Owner, per Walter Fischer, Pres.; American Society of Composers, Authors and Publishers, Society, By Joseph Young, Secretary.

*—12. This rider constitutes #12 of the foregoing contract.

By accepting this contract the Society agrees that all agreements heretofore or hereafter entered into with members for the period beginning January 1st, 1936, are or will be identical in all respects with this agreement.

[fol. 61] Foreign Agreements at This Date in Effect

(See paragraph 11 of the within agreement)

It is distinctly agreed and understood that the powers, rights, authorities and privileges vested in the Society by this instrument, do not include world rights, but are restricted to the United States, —, Austria, Denmark, France, Belgium, Egypt, Greece, Holland, Japan, Monaco,

Portugal, Roumania, Switzerland, Germany, Hungary and Italy.

1-8-36.

It is also understood and agreed that the powers, rights, authorities and privileges vested in the Society by the within instrument shall include Great Britain.

[fol. 62]

EXHIBIT "C" TO COMPLAINT

Agreement made between the Undersigned (for brevity called "Owner") and the American Society of Composers, Authors and Publishers (for brevity called "Society"), in consideration of the premises and of the mutual covenants hereinafter contained, as follows:

The Owner sells, assigns, transfers and sets over unto the Society for the term hereof, the entire exclusive right of public performance (as hereinafter defined), in each musical work:

Of which the Owner is a copyright proprietor; or

Which the Owner, alone, or jointly, or in collaboration with others, wrote, composed, published, acquired or owned;
or

In which the Owner now has any right, title, interest or control whatsoever, in whole or in part; or

Which hereafter, during the term hereof, may be written, composed, acquired, owned, published or copyrighted by the Owner, alone, jointly or in collaboration with others; or

In which the Owner may hereafter, during the term hereof, have any right, title, interest or control, whatsoever, in whole or in part.

The exclusive right of public performance in every musical work shall be deemed assigned to the Society by this instrument and shall vest in and be the absolute property of the Society for the term hereof, immediately, upon the work being written, composed, acquired, owned, published or copyrighted.

The rights hereby assigned shall include:

(a) All the rights and remedies for enforcing the copyright or copyrights of such musical works, whether such copyrights are in the name of the Owner and/or others, as well as the right to sue under such copyrights in the

name of the Society and/or in the name of the Owner and/or others, to the end that the Society may effectively protect and be assured of all the rights hereby assigned.

(b) The exclusive right of public performance of the separate numbers, songs, fragments or arrangements, melodies or selections forming part or parts of musical plays and dramatico-musical compositions, the Owner reserving and excepting from this assignment the right of performance of musical plays and dramatico-musical compositions in their entirety, or any part of such plays or dramatico-musical compositions on the legitimate stage.

(c) The right of public performance by means of radio broadcasting, telephony, "wired wireless," all forms of synchronism with motion pictures, and/or any method of transmitting sound; Provided, however, that the Owner shall have the right, in good faith, by written notice to the Society, to restrict, limit or prohibit the public performance by radio broadcasting of works the copyright of which is vested in the Owner, and the Society agrees that all licenses by it issued shall contain a provision reserving its right to restrict or limit, or to prohibit entirely, the performance by broadcasting of any works in its repertory; and Provided further, that if the Owner notify the Society in writing to restrict, limit or prohibit the public performance of such copyrighted work, the Owner shall not, by the service of such notice, become repossessed of any of the rights transferred to the Society by this assignment.

2. The term of this agreement shall be for a period of five (5) years from the first day of January, 1936, and expiring on the 31st day of December, 1940.

3. The Society agrees, during the term hereof, in good faith to use its best endeavors to promote and carry out the objects for which it was organized, and to hold and apply all royalties, profits, benefits and advantages arising from the exploitation of the rights assigned to it by its several members, including the Owner, to the uses and purposes as provided in its Articles of Association (to which reference is hereby made), as now in force or as hereafter amended.

4. The Owner hereby irrevocably, during the term hereof, authorizes, empowers and vests in the Society exclusively, the right to enforce and protect such rights of public per-

formance under any and all copyrights, whether standing in the name of the Owner and/or others, in any and all works copyrighted by the Owner, and/or by others; to prevent the infringement thereof, to litigate, collect and receipt for damages arising from infringement, and in its sole judgment to join the Owner and/or others in whose names the copyright may stand, as parties plaintiff or defendant [fol. 63] in suits or proceedings; to bring suit in the name of the Owner and/or in the name of the Society, or others in whose name the copyright may stand, or otherwise, and to release, compromise, or refer to arbitration any actions, in the same manner and to the same extent and to all intents and purposes as the Owner might or could do, had this instrument not been made.

5. The Owner hereby makes, constitutes and appoints the Society, or its successor, the Owner's true and lawful attorney, irrevocably during the term hereof, and in the name of the Society or its successor, or in the name of the Owner, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process and pleadings that may be necessary, proper or expedient to restrain infringements and recover damages in respect to or for the infringement or other violation of the rights of public performance in such works, and to discontinue, compromise or refer to arbitration any such proceedings or actions, or to make any other disposition of the differences in relation to the premises.

6. The Owner agrees from time to time to execute, acknowledge and deliver to the Society, such assurances, powers of attorney or other authorizations or instruments as the Society may deem necessary or expedient to enable it to exercise, enjoy and enforce, in its own name or otherwise, all rights and remedies aforesaid.

7. It is mutually agreed that during the term hereof the Board of Directors of the Society shall be composed of an equal number of writers and publishers respectively, and that the royalties distributed by the Board of Directors shall be divided into two (2) equal sums, and one (1) each of such sums credited respectively to and for division amongst (a) the writer members, and (b) the publisher members, in accordance with the system of distribution and classification as determined by the Classification Committee of each group, in accordance with the Articles of

Association as they may be amended from time to time, except that the classification of the Owner within his class may be changed.

8. The Owner agrees that his classification in the Society as determined from time to time by the Classification Committee of his group and/or the Board of Directors of the Society, in case of appeal by him, shall be final, conclusive and binding upon him.

The Society shall have the right to transfer the right of review of any classification from the Board of Directors to any other agency or instrumentality that in its discretion and good judgment it deems best adapted to assuring to the Society's membership a just, fair, equitable and accurate classification.

The Society shall have the right to adopt from time to time such systems, means, methods and formulae for the establishment of a member's status in respect of classification as will assure a fair, just and equitable distribution of royalties among the membership.

9. "Public Performance" Defined. The term "public performance" shall be construed to mean vocal, instrumental and/or mechanical renditions and representations in any manner or by any method whatsoever, including transmissions by radio broadcasting stations, transmission by telephony and/or "wired wireless"; and/or reproductions of performances and renditions by means of devices for reproducing sound recorded in synchronism or timed relation with the taking of motion pictures.

10. "Musical Works" Defined. The phrase "musical works" shall be construed to mean musical compositions and dramatico-musical compositions, the words and music thereof, and the respective arrangements thereof, and the selections therefrom.

11. The powers, rights, authorities and privileges by this instrument vested in the Society, are deemed to include the World, provided, however, that such grant of rights for foreign countries shall be subject to any agreements now in effect, a list of which are noted on the reverse side hereof.

Signed, Sealed and Delivered, on this 25th day of June, 1935. Gene Buck, Owner; American Society of Composers, Authors and Publishers, Society,
By Joseph Young, Secretary.

Articles of Association

Article I

Objects

Section 1. We constitute ourselves a voluntary association under the name of "American Society of Composers, Authors and Publishers," for the following purposes, to-wit:

(a) To protect composers, authors and publishers of musical works against piracies of any kind;

(b) To promote reforms in the law respecting literary property;

(c) To Procure uniformity and certainty in the law respecting literary property in all countries;

(d) To facilitate the administration of the copyright laws for the protection of composers, authors and publishers of musical works;

(e) To abolish abuses and unfair practices and methods in connection with the reproduction of musical works;

(f) To promote and foster by all lawful means the interest of composers, authors and publishers of musical works;

(g) To grant licenses and collect royalties for the public representation of the works of its members by instrumentalists, singers, mechanical instruments, radio broadcasting stations, or any kind of combination of singers, instrumentalists and mechanical instruments, and to allot and distribute such royalties;

(h) To adjust and arbitrate differences and controversies between its members and between its members and others, and to represent its members in controversies, actions and proceedings, involving the right of public performance of any work of any member, or the question of authorship in any work of any member;

(i) To promote friendly intercourse and united action among composers, authors, publishers and producers of musical works;

(j) To acquire, own and sell real and personal property, and to accumulate and maintain a reserve fund to be used in carrying out any of the objects of the society.

(k) To enter into agreements with other similar associations in foreign countries, providing for the reciprocal protection of the rights of the members of each society.

(l) To do any and all other acts or things which may be found necessary or convenient in carrying out any of the objects of the Society or in protecting or furthering its interests or the interests of its members.

Section 2. The principal office of the Society is to be located in the City of New York.

Article II

Duration

The duration of the Society shall be ninety-nine years.

Article III

Membership

Section 1. The membership of this Society shall be divided into five classes, as follows:

Music Publishers

Any person, partnership, firm or corporation regularly engaged for a period of not less than one year in the music publishing business shall be eligible to membership in this class.

Composers and Authors

Any composer and/or author of musical works who regularly practices the profession of writing music and/or the text or lyrics of musical works, and who shall have had not less than five works of his composition or writing regularly published, shall be eligible to membership in this class.

Non-Participating

Each person, partnership, firm or corporation hereafter elected to membership shall be first assigned to this Class, and shall remain therein for a period not exceeding one year from election. At the termination of the said period

the Board of Directors shall, by two-thirds vote of those present, determine whether the membership in this class shall continue, and if so for what additional period, or shall be transferred to the appropriate one of the two preceding classes, or be discontinued. No such membership shall, however, be discontinued except after due notice to the member and an opportunity afforded him to appear before the Board of Directors and show cause why the same should not be discontinued.

[fol. 65] Members in this Class shall not be entitled to vote, hold office, or share in any of the rights, benefits, privileges, royalties or emoluments of the two preceding classes of members.

Honorary Membership

Any person, firm or corporation which has rendered to the art or industry of music, or to this Society, a notable or conspicuous service, may be eligible in this Class and elected thereto by unanimous vote of the Board of Directors. All nominations in respect of this class of membership shall, however, be tabled at the meeting first presented, and may not be acted upon until or after the next succeeding meeting.

Members in this Class shall not be entitled to vote, hold office, or share in any of the rights, benefits, privileges, royalties or emoluments of the first two Classes hereinabove described.

Successors of Deceased Composers and Authors

Any person who has acquired, by will or under any law, the right, title and interest of a deceased composer or author in any musical work, including the right of public performance thereof, may be elected to membership under this Class. Members of this Class shall not have voting power or be eligible to office.

Dues

Section 2. The annual dues, payable on the first day of January in each year, shall be as follows:

Music Publishers	\$50.00
Composers and Authors	10.00
Successors to Deceased Composers and Authors...	10.00

Upon election to either of the above Classes the member shall pay the pro-rata of annual rate to the first day of the

following January, and thereafter at the annual rate of his Class.

Non-Participating	None
Honorary	None

Unless otherwise directed by the Board of Directors, all sums received in payment of dues shall be for the use and benefit of the Relief Fund of the Society.

Upon the default in excess of ninety days in payment of any dues, after notice thereof to the member, the Board of Directors may suspend or expel the delinquent member.

Application for Membership

Section 3. Shall be made in writing upon a printed blank form prepared by the Committee on Membership. Every application shall be signed by an individual applicant in person, by a firm, through a co-partner, by an association or corporation through a duly authorized officer. The application shall be submitted to the Membership Committee and shall be accompanied by proof of eligibility to membership.

Intent of Application

Section 4. The signing and presentation of such an application to the Membership Committee, shall be deemed and construed to be an agreement on the part of the applicant to fulfill, duly perform, and abide by the Articles of Association, and all requirements herein contained; and to conform to, duly perform and abide by, all by-laws, rules, regulations or resolutions, whether expressed in the Articles of Association or otherwise, which may be in force at the time of such application or may thereafter from time to time be adopted, and to all amendments of and additions to the Articles of Association, by-laws, rules or regulations which after the time of such application may from time to time be adopted.

Election to Membership

Section 5. A majority vote of all members of the Board of Directors shall be necessary to elect an applicant to membership.

Obligation of Applicant

Section 6. Each member shall, upon election to Active Membership, execute an assignment in such form as the

Board of Directors shall approve, vesting in the Society the exclusive right to license the non-dramatic public performance of the members works for the period of any then existing agreement between the Society and its members.

Members' List of Works

Section 7. The applicant on being elected to membership shall, upon request, state upon a regular printed form furnished by the Secretary, a brief title, description and the [fol. 66] date of copyright, of each work published or written by him. Each member shall upon the publication of any work of which he is the author, composer or publisher, furnish to the Secretary, a brief title, description, and the date of copyright thereof.

Transfer of Non-Participating Member

Section 8. Upon the transfer of a non-participating member to either "Music Publisher" or "Composers and Authors" Class, and before the transfer shall be deemed as in effect, the member shall execute and deliver to the Society an assignment of non-dramatic public performing rights, in the form submitted by the Society, all of which rights so vested in the Society shall be known as the "performing rights" and are to be held and enjoyed by the Society from the date of election to expiration of any then existing agreement between the Society and its members.

Membership Roll

Section 9. It shall be the duty of the Membership Committee to prepare and keep a membership roll or list of members of the Society.

False Representation by Member

Section 10. Whenever it shall appear to a majority of the Membership Committee that a misstatement upon a material point has been made to it by a member, upon his application either for membership or reinstatement, it shall report the case to the Board of Directors, who by a two-thirds vote of all the members of the Board may expel the member after a trial as in these articles provided.

Failure of Member to Qualif-

Section 11. If within six weeks after the transfer of a "Non-Participating" member to either "Music Publishers"

or "Composers and Authors" Class, the members shall have failed to execute and deliver to the Society the assignment as provided by Section 8 preceding, and to comply with all other rules, regulations and requirements of the Society, the membership shall be discontinued.

Voting

Section 12. No co-partnership, firm, association or corporation shall have more than one vote or representative in the Society. In case of a co-partnership, a member thereof, and in case of an association or corporation, an officer thereof, shall be duly designated as its representative. Such designation shall be filed with the Secretary of the Society.

Article IV

Management

Board of Directors

Elections

Section 1. The government of the Society shall be vested in, and its affairs shall be managed by a Board of twenty-four directors. They shall be elected at each annual meeting of the Board of Directors by a two-thirds vote of the entire Board and shall continue until their successors are elected. They shall be divided into three divisions of equal number. At the first election hereafter held one division, consisting of four publishers, two authors and two composers, shall be elected for one year; one division similarly constituted for two years and one division similarly constituted for three years; but when the term of each division expires their successors shall be elected by the Board of Directors for three years.

At all times six of the members of the Board shall be composers, six authors and twelve publishers. Any vacancy in the Board shall be filled from the class of members in which the vacancy occurred and shall by nomination of the remaining Board members of such class, be elected by a two-thirds vote of the directors present.

Thirteen members shall be necessary to constitute a quorum, and the affirmative vote of two-thirds of such quorum shall be required and shall be sufficient to adopt or pass any motion or resolution authorizing or directing any

act or thing within the power of the Board. Any number less than a quorum may meet and adjourn from time to time until a quorum be present.

The Board may determine the rules of its procedure and make any and all regulations necessary for the carrying on of the business of the Board of Directors and the officers, agents and servants of the Society.

Any former President of the American Society of Composers, Authors and Publishers shall be ex-officio member of the Board of Directors, without the right to vote. Adopted—March 25, 1931.

[fol. 67]

Meeting of Board

Section 2. The Board shall meet at least once in each month except in the months of July, August and September, and shall hold an annual meeting in the month of January of each year. Notices of regular or special meetings of the Board of Directors shall be given by mail by the Secretary to each director at his last known post office address at least two days previous to the time fixed for the meeting. Special meetings of the Board of Directors may be called by the President or Secretary, and shall be called by either of them on written request of any seven directors.

Report of Board at Meetings

Section 3. The Board of Directors shall keep a record of its proceedings which shall be submitted at the annual meeting of the Society, and shall report at such meeting, or at any special meeting of the Society, any business which in its judgment requires the action of the Society.

Article V

Powers of the Board of Directors

Management

Section 1. The Board of Directors shall have charge of and supervision over the general management of the business of the Society, and in addition ~~to the powers~~ by these articles expressly conferred upon it, may exercise all such powers and do all such acts and things as may be exercised or done by the Society.

Contracts

Section 2. Without prejudice to the general powers conferred by the last preceding section and the other powers

conferred by these articles, it is hereby expressly declared that the Board of Directors shall have the following powers, that is to say:

To make contracts or authorize contracts to be made by officers of the Society or by any of the committees provided for by these articles; to fix the rate, time and manner of payment of royalties for the performances of all works registered with the Society; to collect such royalties; to maintain all legal proceedings necessary to enforce payment of such royalties and compromise claims for damages and penalties for unlawful performances; to distribute among the members the royalties collected in the proportionate shares provided for in the scheme of allotment of royalties prescribed in these articles; to enforce the fulfillment of all contracts, both on the part of the members of the Society and third parties, that may have been made by the Society; to authorize the prosecution and defense of any matter, action or proceeding within the scope of the Society, or affecting its interests or involving the rights of public performance of any work of any member or the question of authorship in any work of any member.

To purchase or otherwise acquire for the Society any property, rights and privileges which the Society is authorized to acquire, at such prices and on such terms and conditions, and for such considerations, as it thinks fit.

To appoint and at its discretion remove or suspend, such assistant secretaries, assistant treasurers, managers, subordinates, assistants, clerks, agents and servants, permanently or temporarily, as it may from time to time think fit, and to determine their duties and fix and from time to time change their salaries or emoluments, and to require security in such instances and in such amounts as it may think fit.

To confer by resolution upon any committee or officer of the Society the right to choose, remove or suspend such subordinate officers, agents or servants.

To determine who shall be authorized to sign, on the Society's behalf, receipts, endorsements, checks, releases, contracts and documents.

From time to time to provide for the management of the affairs of the Society in such manner as it thinks fit, and in particular from time to time to delegate any of the powers of the Board of Directors to any Committees, officers or

agents, and to appoint any persons to be the agents of the Society, with such powers (including the power to sub-delegate) and upon such terms as may be thought fit.

To appoint and dissolve all committees; to define, alter and regulate the jurisdiction and exercise original and supervisory jurisdiction over any all subjects and matters referred to said committees; it may direct and control their actions or proceedings at any stage thereof, and shall try all charges against members and punish such as may be found guilty.

The Board of Directors shall have the power to make such regulations and to take such action not inconsistent with the articles of association and the by-laws, as it may deem advisable for the protection of the property and for the general objects of the Society. It shall adopt a seal of the Society.

The Board of Directors shall have the control over and power of disposition of all funds belonging to the Society. It shall determine the manner and form of their investment and the depositaries of such funds.

Salaries of Directors

Section 3. Directors as such shall not receive any salaries for their services except that the sum of \$240 may be appropriated out of the treasury at each meeting of the Board of Directors for distribution as attendance fees among such directors of the 24 members of the Board as shall be present within five minutes after the meeting has been called to order.

In case a director shall be absent from three consecutive meetings of the Board of Directors, unless he shall have been by the President excused from attendance, his office as a Director, and any other office held, shall be declared vacant, and at the next regular meeting of the Board of Directors a successor shall be elected.

Section 4. That no resolution increasing salaries or granting emoluments to officers and employees receiving \$5,000.00 yearly or more, or making unusual or extraordinary expenditure or financial commitment may be passed by the Board of Directors until such resolution is first proposed at a regular or special meeting of the Board of Directors and laid upon the table for final action at its next succeeding meeting. Notice of the meeting at which such resolution is to be voted upon granting the same must be given to the

members of the Board in writing at least five days in advance.

Adopted—March 28th, 1929.

Vacancy in Board of Directors

Section 5. In case of the death, removal or resignation of a director, or of any vacancy in the Board of Directors, such vacancy shall be filled by the election of a director belonging to the same class of directors as the member of the Board whose place is to be filled, for the unexpired term, at the next regular meeting, in the manner provided for the election of directors by the Board of Directors at annual meetings.

Removal or Suspension of Director or Officer

Section 6. In case, at any regular or special meeting of the Board of Directors, two-thirds of those present shall be of the opinion that sufficient cause exists for the removal of any director or officer from such office, and that his removal is for the best interest of the Society, a special meeting of the Board of Directors shall be called, upon three days' written notice to each of the directors, specifying the charges against the director or officer against whom such are directed, and a copy of such charges shall be served upon the director or officer so charged, at least three days before such special meeting. In case, at such special meeting, the directors shall after hearing such director or officer, determine by an affirmative vote of two-thirds of all the directors in office, that sufficient cause exists for his removal, and that his removal is for the best interest of the Society, then such person shall immediately cease to be a director or officer as the case may be, and the resulting vacancy shall be filled as provided in Section 5 next above.

The Board of Directors may suspend from office any officer or director against whom charges have been preferred.

Disqualification of Member of Board of Directors

Section 7. No member of the Board of Directors shall be disqualified from participating in any meeting, action or proceeding of any kind whatever of said Board of Directors, by reason of being or having been a member of a Standing Committee or Special Committee which has made prior inquiry, examination or investigation of the matter under

consideration. Nor shall any member of any Standing or Special Committee be disqualified, by reason of such membership, from acting as a member of the Board of Directors upon any appeal from any decision of such Standing or Special Committee. But no member shall participate in the adjudication of any case in which he is personally interested.

Examination of Member

Section 8. The Board of Directors may, by a two-thirds vote of its members present, require that any member of the Society shall submit to the Board of Directors or any Standing or Special Committee, for examination, such portion of his books or papers as are material and relevant to any matter under investigation by said Board of Directors or by any Standing or Special Committee. Any member who [fol. 69] shall refuse or neglect to comply with such requirements, or shall wilfully destroy any such required evidence, or who, being duly summoned, in pursuance of a two-thirds vote of the members of the Board of Directors present, shall refuse or neglect to appear before the Board of Directors or any Standing or Special Committee, as a witness, or refuse to testify before any such Committee, may be adjudged guilty of an act detrimental to the interest or welfare of the Society.

Final Decision by Trial

Section 9. Any hearing or trial may be adjourned, from time to time, by the Board of Directors in its discretion; but no member thereof, who shall not have been present at every meeting of said Board of Directors at which evidence is taken, or at which an accused member, or a member whose conduct is involved in the hearing or trial, is heard, shall participate in the final decision.

Article VI

Officers

Section 1. Shall consist of a President, two Vice-Presidents, a Secretary, Assistant Secretary, a Treasurer and an Assistant Treasurer who shall be Directors of the Society, and a Counsel who need not be a member of the Society.

Election of Officers

Section 2. The President, the Vice-Presidents, the Secretary, Assistant Secretary, the Treasurer, and Assistant Treasurer, shall be elected annually by the Board of Directors by a two-thirds vote of the entire board, and such officers shall hold the same offices in the Board of Directors. Each officer, excepting the Counsel, shall serve for the term of one year and until the election and qualification of his successor.

Appointment of Counsel

Section 3. The Counsel shall be appointed by the Board of Directors for such term as may be decided by the Board.

Vacancy of Office

Section 4. In a case a vacancy shall occur in the office either of the President, Vice-Presidents, Secretary, Assistant Secretary, Treasurer or Assistant Treasurer, an election shall be held forthwith to fill vacancy for the unexpired term.

Expulsion or Suspension of Officer

Section 5. The expulsion or suspension of a member holding any office or position, to which he has been either elected or appointed, shall create a vacancy therein which shall be filled as provided in these articles.

Article VII

The President

Section 1. The President shall be the chief executive officer of the Society. He shall preside at all meetings of the Board of Directors. He shall have general supervision over the business affairs and property of the Society and over its several officers.

He shall see that all orders and resolutions of the Board of Directors and of the Society are carried into effect and he shall sign all contracts and agreements authorized by the Board of Directors, unless the Board shall otherwise direct. The President shall submit to the Board of Directors, as soon as may be after the close of each fiscal year, and to the members at each annual meeting a complete report of the operations of the Society, or the preceding year,

and of the state of its affairs, making such recommendations as he thinks proper, and he shall from time to time report to the Board of Directors all matters within his knowledge which the interests of the members may require to be brought to its notice. The President shall be ex-officio a member of all standing committees.

Article VIII

The Vice-President

Section 1. The Vice-President shall have such powers and perform such duties as the Board of Directors may from time to time prescribe, and perform such other duties as may be prescribed in these by-laws. In case of the absence of the President or his inability to act, the Vice-President shall discharge the duties of the President.

[fol. 70]

Article IX

The Treasurer

Section 1. The Treasurer shall have charge of the funds, securities, receipts and disbursements of the Society. He shall deposit all moneys and other valuable effects in the name and to the credit of the Society in such depositories as the Board of Directors may from time to time designate. He shall disburse the funds of the Society as may be ordered by the Board, by checks or drafts upon the authorized depositories of the Society, signed by the President or Vice-President and countersigned by himself or an assistant Treasurer. He shall take and preserve proper vouchers for all moneys disbursed. He shall render to the President or to the directors, at the regular meetings of the Board, whenever the President or said Board shall require him to do so, and at every annual meeting of the Society an account of the financial conditions of the Society and of all of his transactions as Treasurer; and as soon as may be after the close of each fiscal year he shall make and submit to the Board of Directors a like report for each fiscal year. He shall keep at the principal office of the Society full and correct books of account of all its business and transactions. He shall give to the Society a bond in such sum as the Board of Directors may from time to time designate conditioned for the faithful performance of the duties of

his office and the restoration to the Society at the expiration of the term of his office or in case of his death, resignation or removal from office, of all books, papers, vouchers, money or other property of whatever kind in his possession belonging to the Society. In the absence of the Treasurer or his inability to act, the Assistant Treasurer shall perform all the duties of the Treasurer. The Treasurer shall pay no bills unless they are properly certified by the officer or committee authorized by the Board of Directors, to make the expenditures. The books and accounts of the Society shall be audited monthly in such manner as the Board of Directors may order.

Article X

The Secretary

Section 1. The Secretary shall be ex-officio Secretary of the Board of Directors and of all standing committees. He shall record all the votes and proceedings of the meetings of the Society, and of the Board of Directors, and of all committees, in a book or books. He shall record all the votes and proceedings of the meetings of the Society, and when authorized by the Board of Directors he shall affix such seal to any instrument requiring the same. He shall countersign all contracts and agreements signed by the President. The seal of the Society, so affixed, shall always be attested by the signature of the Secretary, or an Assistant Secretary. He shall give notice of all meetings of the Society, and of the Directors, and of all committees and of all calls for assessments to be paid by the members. The Secretary shall also have such other powers and perform such other duties as pertain to his office, or as the Board of Directors may from time to time prescribe. In the absence of the Secretary or his inability to act, the Assistant Secretary shall have all the foregoing duties.

Article XI

The Counsel

The Counsel shall be the legal adviser of the Society, the Board and the various committees. He shall have supervision of all matters involving legal questions, and shall appear for the Society in all actions or proceedings.

Article XII

Absence or Suspension of Officer

In case of the absence of the President, a Vice-President, the Secretary, Assistant Secretary, the Treasurer or Assistant Treasurer, or in case of the suspension of any such officer pending his trial on charges, the Board may delegate his powers and duties to any other officer, or to any Director for the time being.

Article XIII

Order of Business, Directors' Meetings

The order of business at the meetings of the Board shall be as follows:

1. A quorum of thirteen members being present the President shall call the Board to order.
2. The minutes of the last meeting shall be read and considered as approved, if there be no amendments.
3. Reports of officers of the Society.
4. Reports of Committees.
- [fol. 71] 5. Unfinished business.
6. Miscellaneous business.
- 7. New business.

Article XIV

Standing Committees

Section 1. Finance Committee. There shall be a Finance Committee of three Directors appointed by the President, who shall attend to and supervise all the fiscal operations of the Society to the extent and in the manner directed by the Board, and this or such other committee as may be appointed by the President shall examine all accounts of the Society at the close of each fiscal year and at such other times as may be deemed necessary, and report thereon.

Section 2. Administrative Committee. The President may also appoint an Administrative Committee from the members, who shall advise with and aid the officers of the Society in all matters concerning its interests and the management of its business and generally perform such duties and exercise such powers as may be prescribed or delegated by the Board of Directors from time to time. This Committee

shall consist of such number as the President shall from time to time see fit. (See Section 5.)

Section 3. Membership Committee. The President shall appoint a Membership Committee consisting of five directors who shall pass upon the applications filed with the Committee and shall verify the statements therein contained, and may require of each applicant additional proof of eligibility to membership.

Section 4. Complaint Committee. The Complaint Committee shall consist of three members of the Board appointed by the President.

Any member against whom a complaint is made before this Committee of violation of the Articles of Association, the by-laws or any resolution of the Society, or of the Board of Directors, regulating the conduct of the members, or of any conduct or proceeding inconsistent with the Articles of Association, or of misconduct, fraud, fraudulent acts or acts derogatory to the welfare of or prejudicial to the Society, shall be notified thereof, and if he desires he shall be heard in his defense, and shall be afforded an opportunity to examine all charges, papers and evidence submitted to the Committee, and to make answer thereto. The Committee shall have power to make rules respecting hearings upon such complaints. Proceedings before the Committee shall be confidential, and shall be disclosed only as the Directors order, after the proceedings have been reported to them. Should the circumstances warrant, the complaint shall be referred to the Board of Directors with all evidence taken before the Committee, and the Board, after investigating said charges, shall summon before it the accused member where he shall have an opportunity to be again heard in person before final action in the case, and, if in the opinion of the Board, the charge or charges against said accused member be substantiated, it may by a vote of not less than two-thirds of the entire Board, censure, fine, suspend or expel said member, and the decision of the Board of Directors shall be conclusive and final.

Section 5. Term of Committees. All standing committees shall be appointed for a term of one year, and shall remain in office until successors are appointed, or until vacated or voided by the Board of Directors.

Except as to the Administrative Committee the member-

ship of Committees shall consist exclusively of members of the Society.

Section 6. Classification Committee. There shall be two Classification Committees for the allotment of royalties—one for the classification of "Music Publisher" members and one for the classification of "Composer and Author" members. The Classification Committee for the Music Publisher Members shall consist of the publisher members of the Board of Directors, and the Classification Committee for the composer and author of members shall consist of the composer and author members of the Board of Directors.

Each such committee shall meet not less than once in each quarter for the purpose of classifying the members over which it shall have jurisdiction.

It shall be the duty of the Classification Committee to determine the status of each member of the Society with respect to the share of the royalties to which he is entitled in the distribution of royalties directed to be made by the Board of Directors. Such Committees, in fixing the status of a member shall take into consideration the number, nature and character of works composed, written or published by such member, the popularity and vogue of such works, the length of time in which the works of the member have been a part of the catalogue of the Society and generally the prestige, reputation, qualifications, standing and service which such member has rendered to the Society. [fol. 72] Such Committee shall, before any distribution of royalties is ordered by the Board, review and revise the classification of the respective members, to the end that the allotment and apportionment of the royalties among the respective members shall be fair, just and equitable to the entire membership.

The Classification Committee shall create several classes, each such class to consist of a group of members having a like status; each member of such group to share equally in the distribution of royalties with the other members of such group. The Committees shall diligently and industriously make due and proper investigation, before each distribution, of the members' standing and advance or reduce a member, as the case may be, from one class to another as the facts and circumstances may warrant, based upon the standards hereinabove set forth.

Protest and Appeal from Classification

Any member, aggrieved by his classification may, after any distribution, file a protest in writing with the Classification Committee having jurisdiction over his classification. It shall be the duty of the Classification Committee to hear such member and to accept from him all papers in evidence submitted to the Committee. The Committee shall have the power to make rules respecting hearings upon such protests, with full power to appoint a sub-committee to investigate such protest.

The Committee shall make its decision within thirty days from the date of filing the protest. The member shall have the right to appeal from such decision to the Board of Directors by filing a notice of appeal in writing with the Secretary of the Society, in which case the protest, with all evidence taken before the Committee shall be referred to the Board of Directors. The Board, after investigating such protest, shall determine the classification of such member by a vote of not less than two-thirds of the directors present. The decision of the Board of Directors shall be conclusive and final. In case of a reclassification of a member, such reclassification shall not be retroactive but shall become effective on the succeeding distribution.

Writers' Board of Appeals

In addition to the composer and author Classification Committee, there shall be elected annually from the general membership (publisher members not voting) three committees, each to consist of three members, one committee of popular song composers and authors, one committee of production composers and authors, and one committee of standard composers and authors; these three committees shall constitute a composer and author board of appeals of nine men, and the personnel of said committees shall be made up as follows:

The Secretary of the Society shall, prior to ninety (90) days before the annual meeting, mail to the class AA members in the popular and production groups, a complete alphabetical list of all Class AA composer and author members of each group and to all standard members a complete alphabetical list of all Class AA composer and author members to BB (inclusive) without disclosing the classification

of any of those whose names appear on the list; he shall at the same time mail to Class A through B (inclusive), members in the popular and production groups, a complete and alphabetical list of all Class A through B members and each of these respective groups without disclosing the classification of any of the members whose names appear on the list; he shall, at the same time, mail to the standard and composer groups from Classes B through C (inclusive), without disclosing the classification of any of the members whose names appear on the list; he shall, at the same time, mail to Class CC through 3 (inclusive), members in the popular and production groups, a complete and alphabetical list of all Class CC through 3 (inclusive), members of each of these groups without disclosing the classification of any of the members whose names appear on the list, and mail to the standard group classes DD through 3, a complete alphabetical list of members of these groups without disclosing the classification of any of the members whose names appear on the list.

The members of each group shall vote to elect one member of said group to each of the three committees constituting the composer and author board of appeals; the person receiving the greatest number of votes in his respective group shall be deemed to be elected to said board of appeals; in the event such member is not available for service, then the person in the same group receiving the next greatest number of votes shall automatically take the place of the absentee as an alternate member of the Board of Appeals.

These nine men so elected shall constitute the Board of Appeals, and said Board shall consist of the following three committees taken from the following groups of classification:

1 member on the Popular Writers' Committee from Class AA.

[fol. 73] 1 member on the Popular Writers' Committee from Classes A through B (inclusive).

1 member on the Popular Writers' Committee from Classes CC through 3 (inclusive).

1 member on the Production Writers' Committee from Class AA.

1 member on the Production Writers' Committee from Classes A through B (inclusive).

1 member on the Production Writers' Committee from Classes CC through 3 (inclusive).

1 member on the Standard Writers' Committee from Classes AA through BB (inclusive).

1 member on the Standard Writers' Committee from Classes B through C (inclusive).

1 member on the Standard Writers' Committee from Classes DD through 3 (inclusive).

The procedure on appeals shall be as follows:

Any member who is dissatisfied with the decision of the Classification Committee may give notice in writing to the Secretary that he proposes to appeal to the Committee on the Board of Appeals which represents his particular group (popular, production or standard), the said Committee shall entertain his appeal and give him an opportunity to appear in person, if he so desires, or to present his appeal in writing, or both; if the said Committee decides against the member, its decision shall be deemed final; if said Committee decides in favor of the member, its decision shall likewise be deemed final, unless the Classification Committee feels that it is to the interest and welfare of the Society that a further appeal be allowed; in such case, the Classification Committee shall so state in writing, and an appeal may thereupon be taken by the Classification Committee, itself, to the entire Board of Appeals of the composers and authors, consisting of nine members; such appeal may be presented in writing or by oral hearing, or both; the decision of such Board of Appeals shall be considered final.

Members shall be given not less than five (5) days notice of the date when their appeal will be heard.

Appeals shall be heard in regular order, and the Board of Appeals shall meet at least once every three months, and until all appeals have been heard.

A majority vote of the Board of Appeals shall rule.

If a member of the Board of Appeals is dissatisfied with his classification and desires to make an appeal, he shall first do so to the Classification Committee and if not satisfied with its decision, then he shall have the right to appeal to the entire Board of Directors of the Society, whose decision shall be final.

The Classification Committee shall delegate one of its members to be at the disposal of the said Board of Appeals

at all times with the necessary data, cards and other information required, and shall supply all information required to said Board of Appeals whenever so requested; the counting and tally of ballots of election shall be under the direction and supervision of the General Manager and President of the Society; the election of the members of the Committees and Board of Appeals of the Composers and Authors, shall take place at least one month prior to the annual meeting of the Society, and the results thereof shall be announced at the annual meeting of the Society, each year, except that the first election shall take place not more than two (2) weeks after the passing of this amendment by the general body.

The decisions of the Board of Appeals, with respect to the proper classification of members, shall not be retroactive.

The Board of Directors of the Society shall make the rules of procedure by which the Board of Appeals shall be governed.

If any member of the Board of Appeals is advanced out of the class and group from which he is elected, then he shall immediately be replaced by his alternate in that particular class and group.

No member elected to serve on the Board of Directors of the Society shall be eligible to serve on the Board of Appeals.

The Board of Appeals must at all times adhere to the rules and regulations of classification as contained in the Articles of Association of the American Society of Composers, Authors and Publishers, under Article XIV, Section 6, and at all times take into consideration all data, etc., which from time to time are used by the Classification Committee in arriving at the just classification of members.

The Board of Directors shall, at its first regular meeting after this amendment is passed and put into effect, fix proper compensation to be paid to the members of the Board of Appeals, at such times as they are required to hold meetings.

The foregoing provisions shall apply only to Author and Composer members of the Society, and not to Publisher members.

This amendment is to take effect immediately.

[fol. 74] **Publishers' Board of Appeals**

In addition to the Classification Committee for the music publisher members, there shall be elected annually from the general membership (composer and author members not voting) two separate committees of three members each, to be known respectively as the

- (1) "Popular Publishers' Board of Appeals"
- (2) "Standard Publishers' Board of Appeals"

and the personnel of each of said committee shall be selected as follows:

(1) The Secretary of the Society shall, prior to ninety (90) days before the Annual Meeting, mail to each and every publisher-member a complete alphabetical list of all publisher-members of the Society, without disclosing the classification of any of such members; he shall also at the same time send to each publisher-member a ballot.

(2) The publisher-member shall, prior to the Annual Meeting, fill out said ballot, each "Popular" publisher-member voting for three members of the "Popular Publishers' Board of Appeals"; and each "Standard" publisher-member voting for three members of the "Standard Publishers' Board of Appeals".

Each such ballot shall be returned by mail to the Society and shall be opened and inspected jointly by the President and General Manager of the Society who shall make a record of each vote. The three persons receiving the highest number of votes in each class shall be deemed elected the members of the indicated ("Popular" or "Standard") Publishers' Board of Appeals and the three persons in each class receiving the second highest number of votes shall be deemed to be alternates to serve in place of those elected in any case and under all circumstances and with the full powers of the duly elected incumbent in the event of his inability or refusal for any reason to serve.

(3) Appeals of "Popular" publisher-members may be presented to and considered by the "Popular Publishers' Board of Appeals" only, and appeals of "Standard" publisher-members may be presented to and considered by the "Standard Publishers' Board of Appeals" only.

(4) The Publishers' Board of Appeals shall meet only in the City of New York, and their respective procedure on appeals presented to them shall be as follows:

(a) Any publisher-member who is dissatisfied with the decision of the Publishers' Classification Committee, may give notice in writing to the Secretary that he proposes to appeal to the appropriate Publishers' Board of Appeals; the said Publishers' Board of Appeals shall entertain his appeal and give appellant an opportunity to appear in person, if he so desires; or to present his appeal in writing or both; on such appeal a sub-committee appointed by the Publishers' Classification Committee may also appear and give evidence justifying its classification of said publisher member; if the said Publishers' Board of Appeals decides against the publisher-member, its decision shall be deemed final.

(b) If the said Publishers' Board of Appeals decides that the publisher-member has been improperly classified, said Board shall bring up such question for review before the Board of Directors as a whole, within thirty (30) days after the filing of the decision of the Board of Appeals and the Board of Directors shall proceed with the question in the manner provided for by these Articles of Association, and the decision of the Board of Directors shall be final.

(c) No member of the Publishers' Classification Committee nor of the Board of Directors shall be eligible to serve as a member of either Publishers' Board of Appeals, nor shall there be eligible to membership on said Board, more than one individual representative of a firm of publishers; such member is to be designated by the firm or corporation publisher-member and his name placed on file with the Secretary of the Society, prior to the annual vote; the expression—"Firm of Publishers" shall include not only publisher-members, corporate, partnership or individual, but all firms, whether corporate, partnership or individual allied with or subsidiary to such publisher-member. If a member of either Board of Appeals is dissatisfied with his classification and desires to make an appeal, he shall first do so to the Publishers' Classification Committee, and if not satisfied with its decision, then he shall have the right to appeal to the entire Board of Directors of the Society, whose decision shall be final.

(d) A majority of the Board of Appeals shall rule; publisher-members shall be given not less than ten (10) days' notice of the date when their appeal will be heard; appeals shall be heard in regular order.

(e) The Publishers' Classification Committee shall dele-

gate at least one of its members to be at the disposal of the said Publishers' Board of Appeals at all times with the necessary data, cards and other information required, and shall supply all information required to said Publishers' Board of Appeals whenever so requested.

[fol. 75] (f) The Publishers' Board of Appeals must at all times adhere to the rules and regulations of classification as contained in the Articles of Association of the American Society of Composers, Authors and Publishers under Article XIV, Section 6, and must at all times take into consideration all data, etc., which from time to time are used by the Publishers' Classification Committee in arriving at the just classification of members.

(g) The Board of Directors shall at its first regular meeting after this amendment is passed and put into effect, fix proper compensation to be paid to the members of the Publishers' Board of Appeals at such times as they are required to hold hearings.

(h) The General Manager shall, within ten (10) days after the adoption of this amendment send to each publisher-member a form upon which the said member shall be required to indicate into which class of membership, "Popular" or "Standard" he desires to be registered. Upon registration in such class a member may vote as provided in Paragraph 2 above only for members of the Publishers' Board Appeals of the class indicated.

Any appeal brought by such member shall be considered only by the Board of Appeals functioning in respect to that class. However, a member desiring to change his class may do so upon request in writing addressed to the Secretary of the Society and approval of such request by the Board of Directors.

(i) The foregoing provisions shall apply only to publisher-members, and not to author and composer members of the Society.

This amendment to take effect immediately.

Section 7. Relief Committee. There shall be a Relief Committee of three Directors, appointed by the President, consisting of one publisher, one author and one composer, who shall investigate requests or applications for relief on behalf of a sick, infirm, needy or deserving member or his widow, infant children or indigent parent. Upon the recommendation of such Committee the Board may direct the

payment of such sum or sums as in its judgment will satisfy the immediate necessities of such person or persons, and to make advances, from any royalties thereafter to accrue to the member, such advances to be repaid to the Society by deducting the whole or any part thereof from any subsequent distribution awarded to such member.

The Board of Directors shall annually devote a part of the proceeds derived from its operations to the purpose of giving financial aid to members of the Society, their widows, infant children or indigent parents. The giving of such assistance is optional and shall only be granted in cases of urgent necessity, and the Society does not vouchsafe to its members the right to receive assistance. Any moneys paid out on account of relief must always be entered in the books of the Society with a statement of the actual purpose for which they were disbursed, and not merely under the head of "Relief."

Article XV

Apportionment of Royalties

Section 1. All royalties and license fees collected by the Society shall be from time to time as ordered by the Board of Directors distributed among its members, provided, however:

(a) That all expenses of operation of the Society and sums payable to foreign affiliated Societies shall be deducted therefrom and duly paid; and

(b) That the Board of Directors, by two-thirds vote of those present at any regular meeting may add to the Reserve Fund any portion not exceeding 10% of the total amount available for distribution; and

(c) That the net amount remaining after such deduction for distribution shall be apportioned as follows: one-half ($\frac{1}{2}$) thereof to be distributed among the "Music Publisher" members, and one-half ($\frac{1}{2}$) among the "Composer and Author" members respectively.

Reserve Fund

Section 2. The Board of Directors, by a two-thirds vote of all those present, shall have the right to create and from time to time to add to the reserve fund, and may direct that a portion of the royalties as and when collected be placed in such reserve fund.

Unclaimed Royalties

Section 3. Royalties which have been apportioned and which have not been claimed by the owners shall remain in the General Fund of the Society for a period of six years. Three months prior to the expiration of said six years, notices shall be given to the parties lawfully entitled thereto, by registered mail, requiring them to receive said royalties within three months, and after the expiration of said three months, such royalties, if not claimed, shall become the absolute property of the Society.

[fol. 76]

Article XVI

General Powers and Duties of Committees

Quorum of Committees

Section 1. A majority of each committee shall constitute a quorum thereof.

Meetings of Committees

Section 2. Each Committee, unless otherwise voted by the Committee, shall meet at least monthly upon a date to be fixed by the Committee, except during the months of July, August and September. The Secretary shall send notices of each meeting to the members thereof at least three days in advance of the meeting.

Absence of Member of Committee

Section 3. If any member of any Committee is absent from two successive meetings without an excuse presented to the Committee, his place may be declared vacant by the President.

Minutes of Committee

Section 4. The standing committees shall keep regular minutes of their transactions and cause them to be recorded in a book kept in the office of the Society for that purpose, and report the same to the Board of Directors at its regular meetings.

Article XVII

Special Committee

Whenever any twenty-five members of the Society shall certify to the Board of Directors that they desire the So

ciety to prosecute any matter within the scope of the Society, the President shall appoint a special committee to investigate the matter and report to the Board of Directors with its opinion thereon whether it is advantageous and for the best interest of the Society to undertake the prosecution of such matter. The Board of Directors shall carefully consider such report and a two-thirds vote of all the directors shall determine whether or not such prosecution shall be undertaken.

Article XVIII

General Meetings of the Society

Section 1. The General Annual Meeting shall be held each year during the month of March. An additional General Membership Meeting shall be held in the month of October of each year. Special meetings may be called at any time by the Board of Directors.

Business Transacted at General Meetings

Section 2. No business shall be submitted to the General Annual Meeting, unless it has been brought to the knowledge of the Board of Directors at least eight days in advance. The General Annual Meeting shall, however, be entitled in any event to lay aside any such business as it may consider inopportune.

Motion or Resolution in Writing

Section 3. Every motion or resolution which shall be made or offered at any meeting of the Society shall, at the request of the Secretary, be reduced to writing and furnished to the Secretary before the question shall be put.

Article XIX

Notices

Section 1. Whenever notice is required to be given to any member, such notice shall not be required to be given by personal service, but such notice shall be deemed to have been given from and at the time when said notice in writing shall have been deposited in the Post Office, or in any regular United States mailing box in the City of New York, enclosed in a post-paid wrapper, addressed to the member

at his last known place of residence, as the same shall appear upon the books of the Society, or if such address shall not appear upon the books of the Society, then to such address as may appear in any directory of the municipality in which he may reside or do business.

[fol. 77]

Article XX

Expulsion and Termination of Rights of Membership

Suspension for Cause

Section 1. Any member who is expelled by the Board of Directors, or who is dropped for the non-payment of dues, fines or assessments, shall thereupon lose and forfeit any and all interest, right or claim in, to or under the Society, the property thereof, and the dues and assessments paid thereto. Upon expulsion, death, bankruptcy, insolvency or other severance of membership in or connection with the Society, all rights and interest of whatsoever character, sort or kind, to, of, in or concerning the Society by virtue of such membership, shall instantly cease and be of no further force and effect. Expulsion shall not relieve any member from his obligations to the Society up to the date of such expulsion.

Posthumous Membership

Section 2. On the death of any member his rights in the Society and membership shall cease, and neither his rights nor his membership nor any right therein shall at any time be, by voluntary assignment, operation of law, legal proceedings or otherwise, vested in any other person whomsoever; provided, however,

That in the sole discretion of the Board of Directors the heir, heirs, or next of kin of a deceased member may be awarded a share in royalty distributions not exceeding that which would, in the judgment of the proper Classification Committee, have been awarded to the deceased member had he been living at the time of such royalty distribution.

Bankruptcy of Member

Section 3. The Board of Directors shall have the right to suspend payments of royalties to any member in case of the filing of a petition in bankruptcy by or against him, and/or the adjudication of such member a bankrupt, or the execu-

tion by such member of an assignment for the benefit of creditors, or the taking advantage by him of the insolvency laws of any State, Territory or Country, or the appointment of a receiver, trustee or liquidator of the assets and property of the member, or the voluntary or involuntary dissolution of a member.

The representative of any member of "Music Publishers" class who shall be a member of the Board of Directors shall immediately upon the happening of any such contingencies be dropped from the Board of Directors.

The royalties, or the right to participate in the royalties, and the rights of the members in the Society, shall not be sold or otherwise disposed of by any member, and shall not be the subject of sale or other disposition by voluntary action, operation of law, legal proceedings or otherwise, and no member shall sell, otherwise dispose of, hypothecate or create a lien upon any royalties accruing, or that may thereafter accrue to him, by virtue of his membership, or any of the rights, privileges, benefits, royalties or emoluments to which he may be entitled by virtue of his membership.

Article XXI

Amendments

These Articles may be amended by a vote of two-thirds of the members present at any meeting of the Society held for the purpose of voting on such amendment.

[fol. 78]

EXHIBIT "E" TO COMPLAINT

Legislature of Nebraska

Fifty-second Session

Legislative Bill No. 478

(Final Form on Third Reading)

A Bill

[fol. 79]

Legislative Bill No. 478

Introduced by Frank J. Brady of Holt.

An Act relating to monopolies; declaring to be an unlawful monopoly and its purposes to be in restraint of trade, any combination of persons, firms or corporations which

fixes and determines the amount of money to be paid to it or to its members for the privilege of rendering privately or publicly for profit within this state copyrighted vocal or instrumental musical compositions, when such combination is composed of a substantial number of all musical composition copyright owners or their heirs, successors or assigns; to require each composer and each author of vocal or instrumental copyrighted musical compositions to act independently of each other and of any combination as herein declared unlawful in determining license fees and other rights within this state; to require the author, composer, printer and publisher to specify upon the musical composition the selling price thereof for all uses that may be made thereof including public performance for profit within this state; to declare that any purchaser thereof, who pays such price therefor, shall have the right to render such music privately or publicly for profit within this state; to declare all existing agreements requiring license fees or other exactions for the privilege of rendering copyrighted musical compositions publicly for profit within this state with any combination of persons, firms or corporations herein declared unlawful to be void and nonenforceable; to permit the present owners, possessors and users of such copyrighted music to render the same privately or publicly for profit within this state without interference by such unlawful combination; to provide for the appointment of a receiver and injunctive relief and the dissolution of such combination as herein declared unlawful; to determine in such action the legal owner of such copyrighted musical compositions; to adjust and fix in such action the license fee to be paid, if any, and the terms for the use of such musical compositions in this state; to provide for the protection of theatres, moving picture houses, hotels, places for education and public performance or amusement, radio broadcasting, radio receiving and radio re-broadcasting stations affiliated with other persons, firms or corporations outside the State of Nebraska against the collection of license fees or other exactions by such out-of-the-state affiliates for or on account of any combination declared unlawful under Section 1 hereof; to provide that the responsibility and all liability for any infringement of copyrighted musical compositions conveyed by radio

broadcast, air, wire, electrical transcription, or sound [fol. 80] production apparatus, or by personal performance coming from outside this state, and used herein, to rest entirely with the out-of-the-state person, firm or corporation originally emanating or sending the same into this state for use herein; to provide penalties for the violation hereof; to empower the County Attorneys and the Attorney General, upon complaint of any party aggrieved by any violation hereof, to proceed to enforce the penalties hereof against such combination and any of its representatives, members or agents, and against the property of such unlawful combination within this state; to define the method of service of process upon such combination as herein declared illegal; to empower any party aggrieved by any violation hereof to proceed in his own right hereunder; to define the legal procedure required to carry out the provisions hereof; to provide for the recovery of costs, expenses and attorney's fees; to provide for the filing of each said composition in the office of the Secretary of State before selling or disposing of the same, together with the amount of filing fee therefor; to provide that the terms of this Act shall be cumulative; to provide that any part of this Act declared illegal shall not affect the validity of the remaining parts hereof; and to declare an emergency.

Be it Enacted by the People of the State of Nebraska:

Section 1. It shall be unlawful for authors, composers, proprietors, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, club, firm, partnership, corporation, or other group or entity, called herein a combination, either within this state or outside thereof, when the members, stockholders, or interested parties therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when at least one of the objects of any such combination is the determination and the fixation of license fees or other exactions required by such combination for itself or its members, stockholders or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public

performance for profit within this state for the purpose of preventing free competition among or with different and competing copyright owners or among or with persons, firms, corporations or associations in this state using or [fol. 81] rendering such copyrighted matter by public performance for profit; or for the purpose of dividing among them the proceeds of the earnings of such copyright owners; or for the purpose of fixing the exactions and fees for the rendition or use of copyrighted matter which any copyright owner must charge; and the collection or attempted collection within this state of such license fee or other exaction so fixed and determined, by any member, agent or representative of any such combination herein declared unlawful, from any person, firm, corporation or association within this state, including theatres, radio receiving, radio broadcasting and radio re-broadcasting stations, moving picture houses, athletic associations, hotels, cafes, restaurants, clubs dance halls, recreation rooms, amusement parks, pavilions, churches, colleges, schools, universities, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered, or permit to be rendered, such copyrighted vocal or instrumental musical compositions privately or publicly for profit within this state through personal performance, or through radio, or any instrumentality or sound producing apparatus, shall be and the same is hereby declared unlawful and illegal; and such license fees or other exactions shall not be collected in any court within the boundaries of this state; and each collection or attempted collection of such license fee or other exaction by such combination or its agents, representatives, members, stockholders or interested parties shall be a separate offense hereunder; and any such combination of authors, composers, publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this state; and such fixing of prices for use or rendition of copyrighted musical compositions within this state by such unlawful combination and the collecting or attempting to collect such license fees or other exactions by it or for its stockholders, members or other interested parties within this state is hereby declared illegal and in restraint of trade, and such collection or attempted collection thereof is declared to be an illegal intrastate transaction within this state and shall be subject to the terms and penalties of this Act. In any action, civil or

[fol. 82] criminal, instituted under the provisions of this Act, it shall be prima facie evidence against any party to such action of the existence of such unlawful combination for the purposes in this Act enumerated, if a substantial number of all authors, composers, proprietors, publishers, owners or their heirs, successors or assigns of copyrighted vocal or instrumental musical compositions in the United States, are shown to be members of any society, association, club, firm, partnership, corporation, group or entity.

Sec. 2. (A). All authors and composers, and their heirs and assigns, shall have within this state all the benefits conferred by the Copyright Laws of the United States, being the act of March 4, 1909, c. 320 Section 1 (e). 35 Stat. 1073, Title 17, U. S. C. A. Each author, composer and publisher shall act independently of any and all substantial number or numbers of other authors, composers and publishers, and also independently of any such combination as in Section 1 hereof declared unlawful, in determining and fixing the price to be charged for the use or rendition of his copyrighted musical compositions within this state, and the author, composer or publisher, or his, her, or its heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition within this state, the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this state and pays the selling price so specified thereon to the seller or publisher of said copyrighted musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered within this state, the said copyrighted musical composition by persons individually or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radios, loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical records, [fol. 83] sound apparatus or otherwise within this state, and the same may be so rendered either privately or publicly for profit when so purchased and paid for without further license fees or other exactions; and such copyright

owner or proprietor, in the event of such payment, shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private purposes or for public performance for profit by such purchaser within this state.

(B). In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private or public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state.

(C). Nothing in this section, or this Act, shall be construed to give to any purchaser of copyrighted music compositions, as herein provided, the right to resell, copy, print, publish, or vend the same.

(D). Any composer, author or publisher of vocal or instrumental copyrighted musical compositions, or any person, firm or corporation controlling the sale or distribution of said compositions, whether or not within the purview of the combination described in Section 1 of this Act, shall, before selling or disposing of any such composition in this state, file in the office of the Secretary of State a copy of each said composition upon which shall be written, printed or typed over his or its signature a statement to the effect that he or it controls the sale or disposition of such composition; and provided further, said person, firm or corporation who shall make such filing shall accompany the same with a fee of Twenty-five Cents (25¢) with each copy of said composition so filed to reimburse the Secretary of State for keeping in current and convenient form, easily accessible to the public, the titles of said compositions and the names of the persons, firm or corporations who shall file said copies from time to time; and provided further, said

Secretary of State shall deposit all the fees received hereunder weekly with the state Treasurer who shall credit said fees to the general fund of the state.

Sec. 3. All existing contracts, agreements, licenses or arrangements now existing within this state made by any person, firm or corporation with any combination, declared unlawful under Section 1 hereof, are hereby declared void and nonenforceable in any court within the boundaries of this state, and are hereby declared to have been entered into as intrastate transactions with such unlawful combination and in restraint of trade; and further, all such contracts, agreements, licenses, arrangements and the attempted enforcement thereof within this state, may be enjoined by any person, firm or corporation sought to be bound thereby; and any member, representative or agent of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, license or arrangement within this state shall be guilty of a violation of the terms of this Act, and for each such collection or attempted collection shall be subject to the penalties hereinafter provided.

Sec. 4. (A). Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this state, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions within this state, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, [fol. 85] of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

(B). When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing, or operating a radio broadcasting station outside this state from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this state, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this state, shall be and is hereby prohibited from in any

manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this state, any herein declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this state to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible within this state, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Sec. 5. (A). Any person, firm or corporation who owns, leases, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this state, shall be and is hereby authorized to receive, use and render, [fol. 86] or cause to be received, used and rendered within this state, by the personal performance of artists, singers, musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or re-production apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever within this state, copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

(B). When such theatre or theatres, moving picture house or houses, or other places for amusement or performance within this state is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted

musical compositions from outside this state, or supply such persons, firms, or corporations in this state with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this state shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect within this state, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this state, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions within this state; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this state against such persons, firms or corporations within this state for [fol. 87] the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Sec. 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of copyrighted vocal or instrumental musical compositions within this state, and which radio stations and theatres, and other persons, firms or corporations, aforementioned, are affiliated with persons, firms or corporations outside this state from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such

music within this state, then any responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this state and thus rendered in this state shall rest with and be upon such affiliated person, firm or corporation from outside this state who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this state; and, if the owner of any copyrighted musical composition commences any action within this state on account of any use or rendition thereof in this state through such affiliate or affiliates, then any defendant in such action may interplead such affiliate or affiliates in such action; and any judgment which may be rendered in favor of the copyright owner shall be paid and satisfied by such affiliate or affiliates; and, if paid or satisfied by the defendant user in this state, such defendant shall be subrogated in said action or otherwise to all rights of the plaintiff in said judgment as against [fol. 88] said affiliate or affiliates, whether the latter is or are a party or parties in said action or not; and in any event such affiliate or affiliates shall be liable to such user to the full extent of his liability to such copyright owner, in the absence of any agreement to the contrary; and any combination declared unlawful by Section 1 of this Act which is the owner or proprietor of or controls the copyrighted vocal or instrumental musical compositions, its agents or representatives shall be and are hereby prohibited from suing for infringement, loss or damage within the boundaries of this state, for the use or rendition of such copyrighted vocal or instrumental musical compositions so originating or emanating because such persons, firms or corporations used, rendered or performed the same within this state; the use or rendition by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers, players and musicians sent into this state, or otherwise, of such copyrighted musical compositions within this state in the manner set forth in this section, shall be considered, for the purpose of this Act, as intrastate business of this state and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this state.

Sec. 7. (A). Any person, firm or corporation within this state who shall act as the representative of any combination herein declared unlawful as defined in Section 1 hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this state, and service of any process against such combination may be had upon such representative or the agent of any such representative as herein defined within this state; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this state.

[fol. 89] (B). Furthermore, any person or persons who negotiates for, or collects within this state, or attempts to collect license fees or other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

Sec. 8. Any combination as in Section 1 hereof declared unlawful and any other person, firm or corporation, acting or attempting to act, within this state in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination, as defined in Section 1 hereof, in the violation of any of the terms of this Act in any manner whatsoever within this state, shall be deemed guilty of a misdemeanor and shall be fined in any sum not more than \$5,000.00 or imprisoned for not more than one (1) year, or both, such fine and imprisonment for each and every violation of the terms hereof.

Sec. 9. (A). The County Attorney in each county in this state wherein a violation of any of the terms of this Act takes place, in whole or in part, is hereby authorized upon the complaint of any party aggrieved to institute a civil or criminal action, or both, under the terms hereof against any combination declared unlawful as defined in Section 1 hereof, and against any of its members, stockholders or other interested parties, and its agents or representatives as herein defined, and to enforce any of the rights herein conferred, and to impose any of the penalties herein provided.

(B.) The Attorney General of the State of Nebraska is hereby empowered to proceed upon the request of any County Attorney to aid and assist, or to take charge of, any prosecution or suit for any violations of any of the terms hereof.

[fol. 90] (C.) Or, the Attorney General, on the complaint of any party aggrieved, because of the violation of any of the terms of this Act anywhere within this state, shall proceed in the District Court in any county in which all or any part of the offense or violation was committed, to institute action against any combination defined as unlawful by Section 1 hereof, and against the representatives or agents of any such combination, either in a criminal action to enforce the penalties hereof, or in a civil action to enforce all rights hereunder, or to dissolve any such combination as declared unlawful by Section 1 hereof, or he may proceed by both civil and criminal actions; in such action or actions, the plaintiff shall be the State of Nebraska; and any interested party may, upon application, be granted leave to intervene in such a civil action.

(D). The District Court shall, in such dissolution or other civil suit, upon the application and intervention in said action of any member, stockholder or other interested party of said unlawful combination, adjudicate the ownership of any copyrighted vocal or instrumental musical composition theretofore owned or controlled by said unlawful combination; and furthermore, such District Court shall have and is hereby granted the power and authority to appoint a receiver and to issue injunctive and mandatory temporary and permanent orders in reference to any of the issues involved in such action; and any person, firm or corporation within this state who is a user in any manner of any copyrighted vocal or instrumental musical compositions theretofore owned or controlled by such unlawful combination may, upon application, intervene in such action and therein have adjusted, determined and adjudicated all rights for or against the person, firm or corporation whom the Court shall finally determine to be the owner or proprietor of such copyrighted vocal or instrumental musical compositions; and said parties shall be permitted no other remedy in any other court within the boundaries of this State, whether the same be for damages, infringement or otherwise, until final decree has been had in said action determin-

ing the ownership and terms for use of such copyrighted musical compositions.

[fol. 91] Sec. 10. (A). Any person, firm or corporation within this state aggrieved by any violation of the terms hereof by any unlawful combination, as defined in Section 1 hereof, or any of its representatives or agents, may proceed in his or its own name and right in the District Court in the county in which the violation, or a part thereof, took place, to recover any right, loss or damage that may have resulted from any violation of the terms hereof; the plaintiff in such action shall be entitled to recover his or its costs and expenses and a reasonable attorney's fee to be fixed by the court in such action.

(B). In the event of the failure or refusal of a County Attorney, or the Attorney General, to promptly act, as herein provided, when requested so to do by any aggrieved party, then such party may institute in his own behalf, or upon behalf of the plaintiff and all others similarly situated, the same civil action as such County Attorney or Attorney General might have instituted under the terms of this Act, and with like procedure, powers, authority, rights, privileges, effect and final decree as the said County Attorney or Attorney General might have done under the terms of this Act.

Sec. 11. (A). In any action, either civil or criminal, that may be had or instituted under the provisions hereof for any violation of the terms hereof, the plaintiff in any form of action brought hereunder, and in which action any combination declared unlawful, as defined in Section 1 hereof, or the members, stockholders, or other interested parties, or their agents or representatives of such unlawful combination, are defendants, any attorney of record for the plaintiff may file a request in writing with the Clerk of the District Court in which said action is pending, demanding that the defendant or defendants furnish plaintiff, or file with the Clerk of the Court, in which the action is pending, exact copies of all documentary evidence, facts and figures, records or data in the possession or under the control of the defendant or defendants pertaining to the issues as alleged by the plaintiff to establish or refute any issues in the case; [fol. 92] and the District Court, upon the presentation to it of such written demand by the plaintiff, shall thereupon de-

termine that part or all of such evidence which shall be produced, and shall enter an order fixing a time for the defendant or defendants to furnish and file such information as ordered. A copy of said order shall be mailed to each defendant at his or its last known address, which shall be deemed sufficient notice and service upon said defendant or defendants; or the same may be served by mail in the same manner upon each attorney of record for the defendant or defendants, and when so served, the same shall be deemed notice and service upon the defendant or defendants for whom said attorneys appear of record.

(B). If said defendant or defendants shall fail to furnish plaintiff or his or its attorney, or file with the Clerk of the Court in which the action is pending, said copy or copies of said documentary evidence, facts, figures, records, books and data as set forth in said order within the time specified in said order, the Court shall adjudge said defendant or defendants guilty of contempt of court, and the Court shall assess a fine of \$100.00 against such of the defendants for each and every day that such defendant or defendants fails to comply with said order; and judgment shall from time to time be rendered therefor, and the plaintiff may collect the same against the defendant or defendants with 6% interest hereon and the costs, including expenses and attorney's fees to be fixed by the Court, in the same manner as other judgments are collected in this state. The Court shall find and determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs, expenses and any attorney's fees that may be allowed.

Sec. 12. If any section, sub-division, sentence or clause in this Act shall, for any reason, be held void or non-enforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act.

Sec. 13. Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any [fol. 93] of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Nebraska.

Sec. 14. Whereas an emergency exists, this Act shall be in full force and take effect, from and after its passage and approval, according to law.

Approved, May 17, 1937.

(Act Construed in *Buck v. Swanson*, 33 Fed. Supp. 377.)

[fol. 94]

EXHIBIT "F" TO COMPLAINT

January 20, 1936.

Omaha Grain Exchange, Radio Station W.A.A.W., Omaha, Nebraska.

GENTLEMEN:

It is mutually agreed that the certain license agreement between us, dated February 14, 1933, effective January 1, 1933, is hereby extended on the same terms and conditions as therein contained, from the date of its present expiration, up to and including December 31, 1940; except that Article 7 of such license is hereby amended so as to read:

"7. In case there shall be a substantial diminution in the quantity of musical numbers, the performing rights of which are licensed under this agreement, then the Licensee shall have the right to terminate this license upon three days' notice by registered mail, addressed to the Society, and this right shall be the sole and exclusive remedy.

The Society reserves the right, at any time, and from time to time, to withdraw from the operation of this license, any musical number or numbers. Upon any such withdrawal the Licensee may immediately terminate this license by giving written notice of its election so to do to the Society.

In the event of any such termination of this License, pursuant to Articles 5 and/or 7 hereof, the Society shall refund to the Licensee pro rata license fees, if any, paid for a period beyond the date of such termination."

and Article 8 is amended by striking out therefrom subdivision (a) and (b).

Very truly yours, American Society of Composers,
Authors and Publishers. By ———. Accepted:
Omaha Grain Exchange. By ———, Title.

Dated January 30, 1936.

[fol. 95]

EXHIBIT "F"

Original
Operator's Broadcasting License

No.: 5

Call: W.A.A.W.

Memorandum of Agreement between American Society of Composers, Authors and Publishers, (hereinafter styled "Society"), and Omaha Grain Exchange (hereinafter styled "Licensee"), as follows:

1. Society grants to Licensee, its successors and assigns, and Licensee accepts for a period of two years and nine months from January 1, 1933, a license to publicly perform by broadcasting from Radio Station W.A.A.W. located at Omaha, Nebraska, non-dramatic renditions of the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of Society, or of which Society shall have the right to license such performing rights.

2. The within license does not extend to or include the public performance by broadcasting or otherwise of any rendition or performance of any opera, operetta, musical comedy, play or like production, as such, in whole or in part.

3. Nothing herein contained shall be construed as authorizing Licensee to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions coming within the purview of the within license performed pursuant hereto, or as authorizing any receiver of any such broadcast rendition to publicly perform or reproduce the same for profit by any means, method or process whatsoever.

4. The within license is limited to the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of Society, or of which Society shall have the right to license the performing rights hereinbefore granted, in programs rendered at or from said radio station, or at or from any other place duly licensed by Society to perform such works (unless the performance originates at a place or from a source which Society does not customarily license), from which place rendition of such works is transmitted to said radio station for the purpose of being broadcast from there.

It is understood, however, that Licensee shall be guilty of a breach under this Article (No. 4) only in the event that it continues to broadcast a program rendered at such places other than the said station after Licensee shall have received notice from Society that such other places are not licensed by Society to perform.

5. The within license is granted upon the express condition:

(a) That should the power input as at present authorized by the Federal Radio Commission for the said station (500 watts) be changed during the term hereof, the basic fee as provided in the first paragraph of Article No. 8 hereof shall be adjusted.

(b) That in event the license of said station from the Federal Radio Commission is terminated, cancelled, revoked or suspended, or in the event that radio broadcasting is supported from other sources or operated by other than private interests, than as now prevails, Licensee shall promptly notify Society thereof, and either Society or Licensee may then terminate this agreement; and in such event, Licensee shall be under no further liability to Society for the payment of any license fee hereunder; provided, however, that if the license of said station to broadcast is suspended for a period less than the term of the within license, then in such event Licensee shall be relieved from payment of the license fee hereunder only during such period of suspension.

[fol. 96] 6. Licensee agrees upon request to furnish to Society during the term of the within license a list of all musical compositions (or, at the option of Licensee, a list of all musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of Society or of which Society shall have the right to license the performing rights hereinbefore granted) broadcast from or through the said station, showing the title of each composition and the composer and/or author thereof; provided that Licensee shall not be obligated under this Article No. 6 to furnish such a list covering a period or periods in the aggregate during any one-calendar year in excess of three months. The lists so furnished by Licensee to Society shall be strictly confidential and Society covenants that it will make no disclosure thereof or of the contents thereof.

7. Society agrees during the term hereof to maintain for the service of Licensee substantially its present catalogue of composition heretofore or hereafter during the term hereof copyrighted or composed by members of Society. Society reserves the right, however, at any time and from time to time to withdraw from its repertory and from operation of the within license any musical composition or compositions; and upon any such withdrawal, Licensee may immediately cancel the within agreement by giving written notice to Society of its election so to do.

In the event of any such cancellation by Licensee, or in the event of a termination of this agreement and the within license pursuant to the provisions of Article No. 5 hereof, or otherwise, Society shall refund to Licensee pro rata license fees, if any, paid for a period beyond the date of such cancellation or termination.

8. Under the terms and conditions hereinabove set forth, Licensee agrees to pay to Society, as compensation for the within license, the sum of Four Hundred Fifty and No/100 Dollars (\$450.00) per annum, payable in equal monthly installments on or before the 10th of each month during the term hereof, plus

(a) For the first nine months of the term hereof, a sum equal to three percent (3%) of the net receipts (as hereinafter defined) of the Licensee from the sale of its broadcasting facilities; and,

(b) For the following twelve months of the term hereof, a sum equal to four percent (4%) of the net receipts (as hereinafter defined) of the Licensee from the sale of its broadcasting facilities; and,

(c) For the remaining twelve months of the term hereof, a sum equal to five percent (5%) of the net receipts (as hereinafter defined) of the Licensee from the sale of its broadcasting facilities.

(d) The term "net receipts" from the sale of its broadcasting facilities shall refer to the full amount charged by and actually paid to Licensee for the use of its broadcasting facilities (sometimes known as "time on the air"), after deducting commissions not exceeding fifteen percent (15%), if any, paid to the advertising agent or agency (not employed or owned in whole or in part by Licensee).

Licensee shall render monthly statements to Society on or before the 10th of each month covering the period of the preceding calendar month on forms supplied gratis by Society, and shall include in such statements all net receipts, without exception, during the said month from the sale of the broadcasting facilities ("time on the air") of the said station, which said statement shall be rendered under oath and accompanied by the remittance due Society under the terms hereof. Any such statement may also include a deduction by or credit to the Licensee for any amount reported by it as received during a prior month from the sale of its broadcasting facilities but which it has been compelled to refund as a "time discount." In the event that any such item shall be collected after it has been credited or deducted as aforesaid, it shall then be included again in the net receipts of Licensee on the monthly statement next succeeding the date of the actual collection.

9. Society shall have the right, by its duly authorized representative, at any time during customary business hours, to examine the books and records of account of Licensee only to such extent as may be necessary to verify any such [fol. 97] monthly statement of accounting as may be rendered pursuant hereto; provided that such examination does not interfere with the usual conduct of business by Licensee.

It is understood and agreed that Society shall consider all data and information coming to its attention as a result of any such examination of books and records as completely and entirely confidential.

10. Upon any breach or default of any terms herein contained, Society may give Licensee thirty (30) days notice in writing to repair or correct such breach or default and in the event that such breach or default has not been repaired or corrected within said thirty (30) days, Society may then forthwith cancel said license.

11. Society agrees to indemnify, save and hold Licensee harmless, and defend Licensee from and against any claim, demands, or suits that may be made or brought against the Licensee with respect to renditions given during the term hereof in accordance with this license of musical compositions contained in Society's repertory heretofore or hereafter during the term hereof copyrighted or composed by members of Society.

In the event of the service upon Licensee of any notice, process, paper or pleading, under which a claim, demand or action is made or begun against Licensee on account of any such matter as is hereinabove referred to, Licensee shall forthwith give Society written notice thereof and simultaneously therewith deliver to Society any such notice, process, paper or pleading, or a copy thereof, and Society shall have sole and complete charge of the defense of any action or proceeding in which any such notice, process, paper or pleading is served. Licensee, however, shall have the right to engage counsel of its own, at its own expense, who may participate in the defense of any such action or proceeding and with whom counsel for Society shall co-operate. Licensee shall cooperate with Society in every way in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein, and shall execute all pleadings, bonds or other instruments, but at the sole expense of Society, that may be required in order properly to defend and resist any such action or proceeding, and properly to prosecute any appeals taken therein.

In the event of the service upon Licensee of any notice, process, paper or pleading, under which a claim, demand or action is made, or begun against Licensee on account of the rendition of any musical composition contained in the Society's repertory but Not heretofore or hereafter during the term hereof copyrighted or composed by members of Society, Society agrees at the request of Licensee to cooperate with and assist Licensee in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein.

12. All notices required or permitted to be given by either of the parties to the other hereunder shall be duly and properly given if mailed to such other party by registered United States mail addressed to such other party at its main office for the transaction of business.

In Witness Whereof, this agreement has been duly subscribed by Society and Licensee this 14th day of February, 1933.

American Society of Composers, Authors and Publishers. By ——. Omaha Grain Exchange, Licensee. By ——.

B.
(Theatres)

#1-367E
Nebraska

Memorandum of agreement between American Society of Composers, Authors and Publishers, (hereinafter styled "Society"), and Ralph D. Goldberg Theatres Corporation (hereinafter styled "Licensee"), as follows:

1. Society grants and licensee accepts for a period of one (1) year commencing noon, June 18, 1936 a license to publicly perform at Military Theatre, 2216 Military Ave., Omaha, Nebraska, and not elsewhere, non-dramatic renditions of the separate musical compositions copyrighted by members of the Society.

2. This license is not assignable nor transferable by operation of law, devolution or otherwise, and is limited strictly to the Licensee and to the premises above named. The license fee herein provided to be paid is based upon the performance of such non-dramatic renditions for the entertainment solely of such persons as may be physically present on or in the premises described, and does not authorize the broadcasting by radio-telephone, transmission by wire or otherwise, of such performances or renditions to persons outside of such premises, and the same is hereby strictly prohibited unless consent of the Society in writing first be had.

3. This license shall not extend to or be deemed to include:

(a) Oratorios, choral, operatic or dramatico-musical works (including plays with music, revues and ballets) in their entirety, or songs or other excerpts from operas or musical plays accompanied either by words, pantomime, dance, or visual representation of the work from which the music is taken; but fragments or instrumental selections from such works may be instrumentally rendered without words, dialogue, costume, accompanying dramatic action or scenic accessory, and unaccompanied by any stage action or visual representation (by motion picture or otherwise) of the work of which such music forms a part.

(b) Any work (or part thereof) whereof the stage presentation and singing rights are reserved.

4. Licensee warrants and represents to Society that the total seating capacity of the above named theatre is 900 seats, upon which warranty and representation the license fee herein is fixed.

5. Society reserves the right at any time to withdraw from its repertory and from operation of this license, any musical work, and upon any such withdrawal Licensee may immediately cancel this agreement. Upon the termination of this agreement pursuant to any provision of this article "5", there shall be made to the Licensee a pro rata refund of any unearned license fees.

6. Licensee agrees, upon demand in writing of the Society, upon forms supplied by Society, whenever requested, to furnish a list of all music rendered at the premises hereby licensed, showing the title of each composition, and the publisher thereof.

7. Upon any breach or default of any term or condition herein contained Society may, upon notice in writing, cancel this license, and in event of such cancellation shall refund to Licensee any unearned fees paid in advance.

8. The parties hereto hereby agree that this agreement shall be deemed to be, and the same shall be, extended and renewed from year to year, unless either party, on or before thirty days next preceding the termination of any year, shall give notice in writing to the other by registered United States mail of the desire to terminate the same at the conclusion of such year.

9. Licensee agrees to pay Society for the license herein the sum of One Hundred and Thirty-Five and no/100 Dollars (\$135.00) annually, payable quarterly in advance in installments of \$33.75 each at the office of Society at Omaha, Nebraska, on June 18, September 18, December 18 and March 18 of each year, commencing on the 18th day of June, 1936.

In witness whereof, this agreement has been duly subscribed and sealed by Society and Licensee this 19th day of June, 1936.

American Society of Composers, Authors and Publishers. By — — —, Agent and Attorney in Fact. Ralph D. Goldberg Theatres Corp. By — — —.

[fol. 99]

EXHIBIT "H" TO COMPLAINT

(General)

#3-5N
Nebraska Hotel.

Memorandum of Agreement between American Society of Composers, Authors and Publishers (hereinafter styled "Society"), and Fontenelle Hotel (hereinafter styled "Licensee"), as follows:

1. Society grants and Licensee accepts for a period of one (1) year commencing Noon, June 8, 1935 a license to publicly perform at Fontenelle Hotel, 18th and Douglas St., Omaha, Nebr., and not elsewhere, non-dramatic renditions of the separate musical compositions copyrighted by members of the Society.

2. This license is not assignable nor transferable by operation of law, devolution or otherwise, and is limited strictly to the Licensee and to the premises above named. The license fee herein provided to be paid is based upon the performance of such non-dramatic renditions for the entertainment solely of such persons as may be physically present on or in the premises described, and does not authorize the broadcasting by radio-telephone, transmission by wire or otherwise, of such performances or renditions to persons outside of such premises, and the same is hereby strictly prohibited unless consent of the Society in writing first be had.

3. This license shall not extend to or be deemed to include:

(a) Oratorios, choral, operatic or dramatico-musical works (including plays with music, revues and ballets) in their entirety, or songs or other excerpts from operas or musical plays accompanied either by words, pantomime, dance, or visual representation of the work from which the music is taken; but fragments or instrumental selections from such works may be instrumentally rendered without words, dialogue, costume, accompanying dramatic action or scenic accessory, and unaccompanied by any stage action or visual representation (by motion picture or otherwise) of the work of which such music forms a part.

(b) Any work (or part thereof) whereof the stage presentation and singing rights are reserved.

4. Society reserves the right at any time to withdraw from its repertory and from operation of this license, any musical work, and upon any such withdrawal Licensee may immediately cancel this agreement. Either party to this agreement may, at any time, upon giving to the other party one day's prior notice in writing, by registered United States mail, terminate this agreement. Upon the termination of this agreement pursuant to any provision of this article "4", there shall be made to the Licensee a pro rata refund of any unearned license fees.

5. Licensee agrees, upon demand in writing of the Society, upon forms supplied by Society, whenever requested, to furnish a list of all music rendered at the premises hereby licensed, showing the title of each composition, and the publisher thereof.

6. Upon any breach or default of any term or condition herein contained Society may, upon notice in writing, cancel this license, and in event of such cancellation shall refund to Licensee any unearned fees paid in advance.

7. The parties hereto hereby agree that this agreement shall be deemed to be, and the same shall be, extended and renewed from year to year, unless either party, on or before thirty days next preceding the termination of any year, shall give notice in writing to the other by registered United States mail of the desire to terminate the same at the conclusion of such year.

8. Licensee agrees to pay Society for the license herein the sum of Three Hundred and Sixty and no/100 (\$360.00) Dollars annually, payable monthly in advance at the office of Society at Omaha, Nebraska in installments of \$30.00 each, payable on the 8th day of each and every month commencing on June 8th, 1935.

In Witness Whereof, this agreement has been duly subscribed and sealed by Society and Licensee this 10th day of June, 1935.

American Society of Composers, Authors and Publishers. By — — —, Agent and Attorney in Fact. Fontenelle Hotel. By — — —.

[fol. 100] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS

"Come now the defendants Harry R. Swanson, Secretary of State, Walter H. Jensen, State Treasurer, William H. Price, Auditor of Public Accounts, and Richard C. Hunter, Attorney General, original party defendants to this suit, and Roy L. Cochran, Governor of the State of Nebraska, upon whom service was made herein on behalf of the State of Nebraska, and file this their motion to dismiss the bill of complaint for the following reasons, to-wit:

1. That from the bill and the amplification thereof by the exhibits attached, and especially Exhibit "E," Nebraska Legislative Bill No. 478 (Pages 74 to 88), it clearly appears that the cause of action must be dismissed on final hearing.

2. That the bill does not state facts sufficient to constitute a cause of action against the defendants or any of them.

3. That the complainants have a plain, adequate and speedy remedy at law as clearly provided by the terms of said L. B. 478.

[fol. 101] 4. That the said Act in question (L. B. 478) seeks by Section 1 thereof to prevent activity within the State of Nebraska of any combination of a substantial number of the owners or proprietors of the copyrights of vocal and instrumental musical compositions when one of its objects is to fix prices, or to restrain trade and competition in such musical compositions, or to prevent free competition among the owners or proprietors thereof; that all the provisions contained in said L. B. 478 are within the powers of this state to enact into law.

5. That Section 2 of said L. B. 478 in no way conflicts with the provisions of the Copyright Laws of the United States (Mar. 4, 1909, c. 320, Sec. 1, 64, 35 Stat. 1075, 1088, Title 17, U. S. C. A.) but rather assures to the author, composer, publisher or proprietor the protection of the individual copyright monopoly; and said Section 2 likewise provides for the protection within the State of Nebraska of the users of copyrighted musical compositions by specifying definite methods whereby the citizens of this state

might learn with whom to negotiate for the use of such copyrighted music and learn the prices required by the owner or proprietor thereof for its use within this state for public performance.

6. That Section 3 of said L. B. 478 declares as unlawful the enforcement within this state only of contracts of the unlawful combination in reference to copyrighted musical compositions; that it is within the power of the Legislature of the State of Nebraska to so define, prohibit, and prevent.

7. That Sections 4, 5, and 6 of said L. B. 478 protect persons, firms, and corporations within the State of Nebraska from unlawful collections or exactions for royalties by the combination through itself or agencies or affiliates should the trust seek to enforce or compel alleged rights to copyrighted music within this state in violation of the statute; that the right to so legislate and anticipate circumvention of the law is within the power of the Legislature of the State of Nebraska to define and prohibit.

8. That Section 7 of said L. B. 478 defines what shall constitute agency and representation of such unlawful combination; that such definition and regulation is within the right of the Legislature of the State of Nebraska to enact into law.

9. That Section 8 of said L. B. 478 defines violations of the law in question as misdemeanors and provides reasonable penalties after trial instituted upon information or complaint, and with all due process of law afforded the accused by the terms of the Act.

10. That Sections 9, 10, and 11 of said L. B. 478 are within the legislative powers of the State of Nebraska to enact into law; that the Act in question sets forth the rights and duties of the County Attorneys and the Attorney General of the State of Nebraska, and specifically and definitely opens to the complainants all the safeguards of the courts of record of the State of Nebraska; that the Act grants to the complainants and all other persons full right to be heard in all matters, and with due process of law afforded in both the civil and criminal procedure provided in the Act.

11. That Sections 12, 13, and 14 of said L. B. 478 are the "saving clause," the "cumulative clause," and the "emer-

gency clause," respectively, and each of which the Legislature of the State of Nebraska enacted and passed into law, and which violate no constitutional rights of complainants or others.

12. That the bill of complaint should be dismissed so far as it relates to objection against the criminal liability imposed for violations (Section 8) because the constitutionality of the Act may be raised as a defense in said criminal proceedings, and due process of law, and equal protection, and all other constitutional defenses are thus afforded and nowhere denied.

13. That said entire bill of complaint should be dismissed because the complainants have a plain, adequate and complete remedy at law; that the Act guarantees to the complainants, and each of them, due process of law fully and completely, and no part of the Act deprives the complainants of their property without due process of law, nor the equal protection of the law, nor other constitutional guar[fol. 103] antees, but on the contrary the statute in question is a plain; ordinary, simple regulation for the protection of users as well as copyright owners of all copyrighted vocal and instrumental musical compositions when used within the State of Nebraska; that said Act was ostensibly designed to prevent the exploitation of the Copyright Act by an unlawful combination of price-fixing owners or proprietors which might adopt methods in restraint of trade and eliminate free competition within this state for the users for public performance for profit of copyrighted vocal and instrumental musical compositions.

14. That the bill of complaint filed herein should be dismissed and the motion and showing in support of the temporary injunction should be denied because the allegations that are well plead in the bill of complaint, even if proven would exempt the complainants from all the provisions of the Act if they so wished, unless they were participants in the unlawful price-fixing combination prohibited or participated in a scheme to fix prices and exact the same and divide that fund as "dividends" or "earnings" among certain members of the unlawful combination.

15. That the bill of complaint should further be dismissed because there is a misjoinder of parties complainant, all of

whom are joined together contrary to the provisions of Rule No. 26 promulgated by the Supreme Court of the United States in accordance with the Equity Rules set forth in Title 28, Sec. 721-723, U. S. C. A., on page 17, for the reason that said bill of complaint alleges no joint cause of action in said complainants, all as shown by the bill itself and the various exhibits attached.

16. That the bill of complaint should be dismissed because it fails to set forth facts or law that would justify this Court in holding that complainants have been denied, or will be denied, jointly or severally, their constitutional rights in contravention of any of the following provisions [fol. 104] plead by complainants (page 44) as the basis for relief herein:

A. As to the Constitution of the United States

1. Art. I, Sec. 8 (To promote progress of science and arts)
2. Art. I, Sec. 9 (Ex post Facto)
3. Art. I, Sec. 10 (Impair obligation of contracts)
4. Art. III, Sec. 2 (Place of trial)
5. Art. IV, Sec. 2 (Citizen of each state entitled to all privileges and immunities)
6. Art. VI, Sec. 2 (Bound by treaties)
7. Amendment XIV (Due process and equal protection)

B. As to the Constitution of the State of Nebraska

1. Art. I, Sec. 1 (Equal rights)
2. Art. I, Sec. 3 (Due process)
3. Art. I, Sec. 7 (Search and seizure)
4. Art. I, Sec. 13 (Justice without delay)
5. Art. I, Sec. 15 (Severe penalties)
6. Art. I, Sec. 16 (Ex post Facto impairing obligations)
7. Art. I, Sec. 21 (Compensation for private property)
8. Art. I, Sec. 25 (Discrimination between citizens)

C. Present Copyright Law (Mar. 4, 1909, c. 320, Sec. 1, 64, 35 Stat. 1075, 1088, Title 17, U. S. C. A.);

that said references to said constitutional and statutory provisions above set forth and found on page 44 of the bill of complaint are conclusions, and no facts are alleged showing impending loss of property or rights sufficient to justify

granting any part of the prayer for relief, either by way of [fol. 105] temporary injunction or any relief upon final hearing.

William J. Hotz, Special Assistant to the Attorney General of Nebraska, 1530-5 City National Bank Building, Omaha, Nebraska.

Richard C. Hunter, Attorney General; Barlow Nye, Of Counsel, Administrative Assistant to Attorney General, State Capitol Building, Lincoln, Nebraska."

[fol. 106] STATEMENT RE TEMPORARY INJUNCTION

Plaintiffs on the 7th day of June, 1937, filed a motion for temporary injunction, with showing. Defendants filed answer thereto with showing. The temporary injunction was granted and opinion given as found at pages 98 and 99 hereof. No appeal was prosecuted from the temporary injunction; and therefore all proceedings in reference thereto, except the opinion and temporary order of injunction have been eliminated from the printed record.

IN UNITED STATES DISTRICT COURT

[fol. 107] DEFENDANTS' EXCEPTIONS—Filed November 18, 1937

Come now the defendants in the above entitled cause and file this objection to the orders and rulings of the court entered herein on November 13th, 1937, wherein the court granted the complainants a temporary injunction and denied the defendants' motion to dismiss, and request that exception be granted defendants to said rulings and orders.

Richard C. Hunter, Attorney General of Nebraska;
Barlow Nye, Administrative Assistant; William J. Hotz, Special Assistant to the Attorney General of Nebraska, 1530-5 City National Bank Building, Omaha, Nebraska, Counsel for Defendants.

[fol. 108] IN UNITED STATES DISTRICT COURT

ANSWER—Filed November 18, 1937

Come now the defendants, who have been served with process, and file this their answer to the bill of complaint, and allege as follows:

I

That the defendants are without knowledge of the organization of the American Society of Composers, Authors and Publishers under the laws of the State of New York and require the pleading of those statutes of New York under which the said Society claims to exist; that the defendants have no knowledge that the purposes of said Society are actually as set forth throughout the bill of complaint, nor have the defendants knowledge of the reason that one of the plaintiffs, Gene Buck, brings the action as president of the organization of the said Society, if the Society is organized under the laws of New York as an entity; nor do the defendants have knowledge of the necessity for some of the members of said Society joining as plaintiffs, if it appears upon proof that the Society is properly incorporated under the laws of New York and has the right to sue and be sued; and if it so appears, then there is a misjoinder of parties complainant in that there exists no joint cause of action among them.

II

That the defendants have no knowledge of the individual status of the complainants, Gene Buck, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, as alleged in the bill of complaint, or that they have written, composed, or own the musical compositions in the bill of complaint referred to, or that said parties are citizens or residents of the places designated in the bill of complaint.

III

Defendants admit that the defendants in the action are as [fol. 109] set forth in Paragraph 5 of the bill of complaint and that Exhibit "E" attached to the bill of complaint is Legislative Bill No. 478 passed by the 52nd Session of the

Nebraska Legislature, and that the same properly became a law of the State of Nebraska by approval on May 17th, 1937, and is the act in question in these proceedings.

IV

The defendants specifically deny all the matters set forth in Paragraphs 7, 8, and 9 wherein the complainants allege that the Nebraska act seeks to deprive the complainants of their rights under the Copyright Laws of the United States Government, when, as a matter of fact, the act denies no rights to any individual composer, author, or publisher of copyrighted vocal or instrumental musical compositions but merely seeks to prevent an unlawful combination of authors, composers, and publishers who band themselves together to unlawfully fix and determine prices, and to stifle and prevent competition, and who seek to restrain trade; and further, the act nowhere denies due process of law but on the contrary gives full, complete, and equal protection of the law to all parties affected and provides for no summary action against any person, firm, or corporation in the enforcement of any of its provisions.

V

That the defendants have no knowledge of any of the matters set forth in Paragraphs 10 to 34 inclusive of said bill of complaint, and therefore must be denied.

VI

For further answer, the defendants admit Paragraph 35 so far as the defendants therein set forth are designated as the particular officials therein set forth, but specifically deny that any of the defendants have threatened to or will enforce the terms of the statute against any of the individual complainants, nor have they threatened to enforce the act against the complainant Society only in the event that the complainant Society would operate in the State of Nebraska in violation of the terms of the statute by conniv[fol. 110] ing and conspiring to fix and determine prices for public performance of copyrighted musical compositions unlawfully controlled by it and to stifle competition and to restrain trade, and to unlawfully and illegally exact fees and licenses for such unlawful combination within the State of Nebraska.

VII

In answer to Paragraph 36 of the bill of complaint, the defendants allege that the penalties and other provisions for the enforcement of the Nebraska Act in question are far from unduly drastic but are only similar to the provisions of the Sherman Anti-Trust Act of the United States as well as the anti-monopoly and anti-discrimination statutes of the State of Nebraska in reference to all other styles and kinds of business where the laws are violated in reference to unlawful monopoly as shown by Chapter 59 of the Compiled Statutes of Nebraska for 1929 and the amendments thereto, which are hereby referred to and by reference made a part hereof; and further, that the act in question is merely a pronouncement of the economic policy and the legislative will of the State of Nebraska in reference to monopolies and unlawful combinations and price fixing organizations in reference to copyrighted musical compositions, which act generally follows the same provisions in reference to all other things and commodities that are the subject matter for acts relative to unlawful, price fixing combinations in restraint of trade within this state.

VIII

The defendants specifically deny that the law in question contravenes Article I, Sections 8, 9, and 10, Article III, Section 2, Article IV, Section 2 and Article VI, Section 2, of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States, and Article 1, Sections 1, 3, 7, 12, 13, 15, 16, 21 and 25, of the Constitution of the State of Nebraska; nor does the Nebraska act in question in any way violate any of the terms of the Copyright Statute of March 4, 1909, or any amendments thereto, but on the contrary assures to the individual copyright owners the exclusive right for which said Copyright Act was enacted, and nowhere does said Copyright Act authorize, sanction, or permit either expressly or impliedly a combination of copyright owners or their publishers or assigns or agents to combine for the purpose of indulging in unlawful monopolistic practices and the fixing, determination and controlling prices and stifling of competition and acting in restraint of trade within the State of Nebraska or elsewhere.

IX

For further answer, the defendants state that the complainants have a plain, adequate, and complete remedy at law as clearly set forth in Sections 9, 10, and 11 of the Nebraska act, which are the enforcement provisions thereof, and which provide for full and complete trial in courts of competent jurisdiction after notice and hearing and with all the protection given to litigants in similar matters within the State of Nebraska, and with the constitutional guarantees of trial by jury in cases and law and adequate equity rules in courts of equity.

X

The defendants have no knowledge whatever of the matters set forth in Paragraph 37 of the bill of complaint, and the defendants aver that in reference to the matters therein set forth that the act in no part thereof denies the individual copyright owner full right and complete protection and freedom of contract and right to deal freely and without restriction within the State of Nebraska in reference to his, her, or its copyrighted music within the State of Nebraska whether the same be for private performance or for public performance for profit.

[fol. 112]

XI

The defendants deny all the provisions of Paragraph 38 of the bill of complaint in reference to the alleged constitutional violations and allege that no contracts are impaired or sought to be impaired by the provisions of the Nebraska act in question, but full faith and credit is guaranteed under the laws of the State of Nebraska and under the legislative act in question of all contracts made and entered into by copyright owners for the enforcement of their rights, and that no threats have been made by any of the defendants that any attempt has been or will be made to impair or limit or curtail those rights under the provisions of the act in question or otherwise.

XII

Defendants further state in answer to the bill of complaint that the same fails to state a cause of action against the defendants; nor have the complainants shown that the respective provisions of the act in question are violative

of any of the constitutional provisions of the United States or of the State of Nebraska, while on the contrary said bill provides for an orderly procedure in reference to the announced legislative policy of the State of Nebraska in dealing with the evils set forth in the legislative bill in question in reference to the abuse that might be made by the unlawful control by a price fixing combination of dealers in the public performance rights of copyrighted vocal and instrumental musical compositions within the State of Nebraska, and for the protection of all the users thereof, including hotels, amusement parks, dance halls, radio stations, theatres, and all other users of such music for public performance for profit throughout the State of Nebraska.

XIII

The defendants are without knowledge of the matters set forth in the contracts, agreements and written instruments known as Exhibits "A", "B", "C", "D", "F", "G", and [fol. 113] "H", attached as exhibits to the bill of complaint, and therefore the same must be denied.

XIV

That the bill of complaint nowhere shows that the complainants are entitled to either temporary or perpetual injunction, and it is apparent that the complainants have a plain, adequate and speedy remedy at law as provided by the act itself in the event that any of the complainants are proceeded against under the terms and provisions of the act; that the act in question is directed against unlawful, price fixing combinations acting in restraint of trade and not against any of the complainants unless they themselves subject themselves to its provisions; that the bill of complaint fails to state a cause of action for the relief prayed therein, and because thereof the injunctions sought should be denied and the bill dismissed.

XV

For further answer, the defendants state that the complainant American Society of Composers, Authors and Publishers is an unlawful combination of a substantial number of the owners of copyrighted vocal and instrumental musical compositions within the United States; that said unlawful combination operates within the State of Ne-

braska by unlawfully and wrongfully fixing prices within the State of Nebraska in restraint of trade and contrary to all the provisions of the act; and that it does unlawfully and wrongfully exact fees and licenses within this state in violation of the terms of said act; that said Society does control substantially all the public performance rights of all the copyrighted vocal and instrumental musical compositions used within the State of Nebraska in violation of the terms of said act, and that it does through its publisher members actually own and control substantially all the copyrighted musical compositions for use within this state, and in violation of the terms of said act, and actually does fix and control prices for its use for all purposes within [fol. 114] Nebraska, contrary to the provisions of the act.

Wherefore, Defendants Pray that the prayer of the complainants' bill be denied in each and every particular; that the act in question, being Legislative Bill No. 478, be held by the court to be a valid exercise of the legislative authority of the State of Nebraska; and that the American Society of Composers, Authors and Publishers be adjudged to be an unlawful, price fixing monopoly that falls within the definitions and provisions of said act, and that by reason thereof that said complainant Society be adjudged to have no rights to interfere with the enforcement of said act within the State of Nebraska; that the defendants have such other and further relief as the court may deem just and equitable in the premises, and for their costs expended herein.

Richard C. Hunter, Attorney General of Nebraska.
Barlow Nye, Administrative Assistant. William
J. Hotz, Special Assistant to the Attorney General
of Nebraska, 1530-5 City National Bank Building,
Omaha, Nebraska, Counsel for Defendants.

(Duly verified by Harry R. Swanson, Secretary of State.)

[fol. 115] IN UNITED STATES DISTRICT COURT

ORDER GRANTING DEFENDANTS LEAVE TO FILE
INTERROGATORIES

Now on this 9th day of December, 1937, this cause came on for hearing upon the application of the defendants in the above entitled cause for an order allowing them to file

herein the interrogatories submitted with said application to be answered by such officers of the complainants as are designated in said interrogatories; and

It appearing to the Court that three of the complainants are private corporations and one is a private association, and that said interrogatories are for the discovery of facts and the discovery of documents material to the defense of this cause;

It Is Therefore Ordered that the said defendants be and they hereby are allowed to file interrogatories herein forthwith and that Gene Buck, President of the American Society of Composers, Authors and Publishers, of 30 Rockefeller Plaza, New York, New York, and Walter S. Fischer, President of Carl Fischer, Inc., of Darien, in Fairfield County, State of Connecticut, and Gustave Schirmer, Secretary of G. Schirmer, Inc., of No. 812 Park Avenue, in the Borough of Manhattan, City and State of New York, and Saul H. Bornstein, Treasurer of Irving Berlin, Inc., of No. 14 East 75th Street, in the Borough of Manhattan, City and State of New York, shall separately and fully answer such of said interrogatories and furnish such of the documents therein requested as are designated in said interrogatories, and that said answers shall be in writing under oath and signed by each officer interrogated, and filed herein within fifteen (15) days of service of same upon the solicitors for complainants.

Archibald K. Gardner, United States Circuit Judge.
Thos. C. Munger, United States District Judge.
J. A. Donohoe, United States District Judge.

[fol. 116] IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE PARAGRAPH 15 OF ANSWER

At the time of the trial, the complainants made the following motion:

"The complainants move that Paragraph 15 of the Defendants' Answer be stricken for the reason that the allegations contained in said Paragraph 15 constitute no defense to any of the issues tendered in this case by plaintiffs' Bill of Complaint; and for the reason that said Paragraph 15, or the allegations in it contained, tender no issue

properly triable in this case." (O.R. Ev. 4. There was no ruling made upon this Motion.)

[fol. 117] IN SUPREME COURT OF THE UNITED STATES

PETITION FOR APPEAL

To the Honorable Archibald K. Gardner, United States Circuit Judge; Thomas C. Munger and James A. Donohoe, United States District Judges, sitting in equity and in pursuance of Section 266 of the Judicial Code:

(Buck v. Swanson, 33 Fed. Supp. 377)

1. The above captioned defendants and appellants petition Your Honors for an order allowing an appeal from the order over-ruling their motion for new trial and rehearing, and to correct the decree entered, in the United States District Court, for the District of Nebraska, Lincoln Division, on March 28, 1940. Theretofore, in the above cause, an opinion of Your Honors was filed and entered on December 28, 1939; and thereafter, findings of fact, conclusions of law, and decree were filed and entered on the 25th day of January, 1940. The said motion for new trial and rehearing and to correct the decree had twenty-two (22) affidavits attached, and was filed on February 5, 1940. The final decision overruling the motion to correct the decree, as above stated, was entered on March 28, 1940.

2. Thus, this petition for appeal is presented for allowance within the three (3) calendar months provided by statute.

3. Copies of each of the aforementioned papers, pleadings, decree, and orders will be attached to the jurisdictional statement to be filed.

4. The assignment of errors accompanying this petition set forth the defendants' conclusion for the requested reversal and dismissal of the appellees' bill of complaint or to correct the decree, which Your Honors denied when the permanent injunction was granted restraining the enforcement of the Nebraska Legislative Act in question, known as Legislative Bill No. 478, Chapter 138, page 488, Session Laws of Nebraska for 1937, approved by the defendant governor on May 17, 1937.

5. This Act prohibited those who controlled the copyrights on vocal and instrumental musical compositions from combining to fix prices for public performance rights and from operating in restraint of trade in Nebraska.

6. The defendants are aggrieved by the decision and therefore petition Your Honors for the allowance of the appeal, principally because the Court, after finding that the plaintiffs were operating in Nebraska as a monopoly, held the entire act non-enforceable because parts of it were held to be in violation of the National Copyright Act (Title 17, U. S. C. A.); and that the said part of the Act [Sec. 2 (B)] was the inducing cause for its passage and inseparable from the remaining parts. To this ruling the appellants except and disagree with the final orders entered.

[fol. 119] 7. However, this petition for appeal is likewise based upon all the assignments of error and the legal points raised in the statement of jurisdiction and brief in support.

8. Because this case was heard before a three-judge federal court, sitting in equity under Section 266 of the Judicial Code (Title 28, U. S. C. A., Section 380), and by its decision has permanently restrained and enjoined the defendant state officials from enforcing the above mentioned state statute upon the grounds that the Act was repugnant to the laws of the United States and the Constitution, a direct appeal to the Supreme Court of the United States may be had herein, as provided in Section 238 (3) of the Judicial Code (Title 28, U. S. C. A., Sec. 345). The allowance of this appeal is requested accordingly.

9. The jurisdictional amount in controversy, both by stipulation of the parties of record and the finding of the Court upon the facts, has been established as sufficient.

10. All the above mentioned defendants and appellants are citizens and residents of the State of Nebraska, and all the plaintiffs and appellees are citizens and residents of the States of New York and Maine.

11. Defendants and appellants tender surety company cost bond in the amount of \$250.00, as provided by Rules 72 and 73 of the Rules of Civil Procedure.

Wherefore, all the appellants pray:

1. That this petition for appeal may be granted.

2. That citation may issue to all the plaintiffs and appellees.

3. That said cause upon appeal be reversed and the permanent injunction denied, vacated, and set aside, and the appellees' cause of action dismissed at the appellees' costs, and

[fol. 120] 4. That they be granted such other and further relief as may be just and equitable in the premises.

William J. Hotz, Special Assistant to the Attorney General, 1530-5 City National Bank Bldg., Omaha, Nebraska.

Walter R. Johnson, Attorney General of the State of Nebraska, Lincoln, Nebraska.

John Riddell, Assistant to the Attorney General of the State of Nebraska, York, Nebraska.

Attorneys for Appellants.

William J. Hotz, Omaha, Nebr.

[fol. 121] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING APPEAL

The appellants in the above entitled cause, who were the defendants, and each of them, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the opinion, findings of fact, conclusions of law and decree, and the order overruling the motion for new trial, rehearing and to correct said decree, made and entered on March 28, 1940, in the above entitled cause by the United States District Court, District of Nebraska, Lincoln Division, sitting as a three-judge federal court under Section 266 of the Judicial Code; and having presented their petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction, pursuant to the statute and rules of the Supreme Court of the United States in such cases made and provided;

It is now here ordered that an appeal be, and the same is, hereby allowed to the Supreme Court of the United States from the District Court of the United States, for the District of Nebraska, Lincoln Division.

It is further ordered that the Clerk of said court shall prepare and certify a transcript of the record, proceedings, and decree in this cause in accordance with the designation of record filed by the appellants and otherwise in accordance with the rules of the Supreme Court of the United States in such cases made and provided and of the Rules of Civil Procedure of this court in reference thereto; and [fol. 122] shall transmit the same, when so prepared, to the Clerk of the Supreme Court of the United States so that he shall have the same in said court within forty (40) days from this date.

It is further ordered that security for costs on appeal be fixed at \$250.00.

- Dated at Lincoln, Nebraska, this 27th day of June, 1940.
Thos. C. Munger, United States District Judge.

[fol. 123] Citation in usual form filed June 27, 1940, omitted in printing.

[fols. 124-125] Bond on Appeal for \$250.00 approved June 27, 1940, omitted in printing.

[fol. 126] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed June 27, 1940

After a three-judge federal court, acting under Section 266 of the Judicial Code, had granted a temporary injunction and that same court, upon a hearing on the merits, granted an absolute, permanent injunction enjoining the appellant state officers from enforcing any of the provisions of a duly enacted state law, free from federal constitutional objections, and where no action on the state law had ever been had before any state court, the appellants claim that;—(Buck v. Swanson, 33 Fed. Supp. 377):

I

The Court erred in holding in its opinion of December 28, 1939, that Section 2 (B) of the Nebraska statute in

question (Session Laws 1937, Chap. 138, page 488) was the inducing cause for its passage and inseparable from the balance of the Act, and therefore the entire Act was non-enforceable, because it affirmatively appeared from the Act itself that said subsection might be stricken and the balance of the Act would be full, complete, enforceable, and independent of said alleged objectionable clause or clauses in Section 2.

II

The Court erred in refusing to correct its decree on rehearing when it then affirmatively appeared by the affidavits of a majority of all the legislators, each of whom voted for the Act, that the said objectionable section (Section 2 (B) together with Subsections 2 (A) and 2 (D) had no influence [fol. 127] whatever upon them in their affirmative vote; and that neither of said subsections were the inducing cause for the affirmative vote of any one of said legislators.

III

The Court erred in granting the permanent injunction after it had found in its opinion of December 28, 1939, that the following facts (a) to (n) had been established by competent evidence at the trial:

(a) That the appellee ASCAP was made up of 1,000 music composer members and 123 music publisher members; that these music publisher members constituted substantially all of the music publishers in the United States.

(b) That ASCAP was likewise affiliated with 44,000 foreign composer members throughout the world whose music was exclusively controlled in the United States by ASCAP.

(c) That ASCAP actually did control from 85% to 90% of the popular copyrighted vocal and instrumental musical compositions and from 50% to 75% of the standard or older music used in Nebraska and elsewhere throughout the United States.

(d) That the users of music in the State of Nebraska, including radio stations, dance halls, hotels, theaters, and places of amusement must necessarily, for the successful operation of their business, deal with ASCAP.

(e) That there was no place, or person, or agency to whom the users of music in Nebraska might go in order

to deal for the public performance rights in any substantial amount sufficient to meet the ordinary needs of users in the state, except ASCAP.

(f) That the appellees, and all other members of ASCAP had assigned in writing to it the exclusive right to all their public performance rights.

(g) That the collections were made in the State of Nebraska by ASCAP of at least \$70,000 annually; that the same was distributed, after the expense of operation, one-half thereof to the publisher members and one-half thereof to the composer members, classified by a self-perpetuating board of directors of ASCAP, as shown by their articles of association attached to their bill of complaint and in evidence.

(h) That the public was interested because there were in Nebraska 350 dance pavilions and ballrooms independent of taverns, where dancing was carried on incidentally; that there were ten radio stations operating within the state, all dealing with ASCAP, and one of which stations was [fol. 128] affiliated with the Columbia Broadcasting Network and the other with the National Broadcasting Network; that there were a large number of theaters as users of ASCAP music, and 284,000 radio receiving sets in private homes that listened to ASCAP music from the ten radio stations; that about one-third of the population of the state at one time or another during the year attended dances and balls where ASCAP music was played.

(i) That the theaters paid to ASCAP approximately \$12,000 per year at ten to fifteen cents per seat per year; that the largest radio stations each paid \$22,000 or more per year to ASCAP; that there were 391 signed contracts in evidence with users in the state in which ASCAP, through its Nebraska representatives and agents, was the licensor and recipient of all the collections.

(j) That the exclusive right to make collections, to fix all prices, and to carry on all the public performance rights of all the copyrighted musical compositions of all its members was vested by each member in ASCAP under contracts in evidence.

(k) That throughout the nation some \$6,000,000 was collected annually, of which approximately 20% was to pay the

overhead expense of ASCAP; and that Nebraska users paid their proportionate part of that sum.

(l) That the protection by ASCAP of the legal rights by infringement suits for the members of their copyrighted musical compositions, which the individuals could not as readily carry on or detect themselves, would not authorize the monopolistic practices nor curtail the exercise of the police power of the State of Nebraska to prevent the unlawful monopoly of ASCAP.

(m) That the National Copyright Act (Title 17 U. S. C. A.) gave no right to copyright owners to combine with other copyright holders to insure control of prices and the consequent power of monopoly of an entire field.

(n) That the necessity urged by the appellees as a justification or warrant for their organization was of no avail as a defense. o

Explanation: (All the foregoing facts were found by the Court in its opinion of December 28, 1939, and also in the findings of fact of January 25, 1940.)

IV

The Court erred in finding in its opinion of December 28, 1939, that Section 2 (B) was the inducing cause for the passage of the entire Act and was inseparable from the balance thereof, when that issue was not pleaded and was not raised in any manner at the trial by either the appellees or [fol. 129] the Court upon its own motion during the trial.

V

The Court erred in granting a permanent injunction against the enforcement of Sections 1, (not 2), 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 of the Act in question, when said sections merely declared the announced rules of law universally applied in Nebraska against all unlawful monopolistic combinations (Chapter 59, Comp. St. Neb., 1929, and Amendments, Monopolies and Unlawful Combinations; Art. 1, Trusts Generally; Art. 2, Grain Dealers; Art. 3, Fire Insurance Companies; Art. 4, Lumber and Coal Dealers; Art. 5, Local Discrimination; Art. 6, Pooling by Bridge Contractors; Art. 7, Rebate Vouchers; Art. 8, Unlawful Restraint of Trade; Art. 9, Regulation of Public Markets;

Art. 10, Dairy Industry; 1937 Supp., Chap. 59, Art. 11, Protection of Trade Marks, Brands and Names).

VI

The Court erred in failing to apply the announced principle of law in Nebraska that:

"Although a statute may be invalid or unconstitutional in part, the other parts will be sustained, where they can be separated from the part which is void."

VII

Furthermore, the Court erred in holding in its opinion that Section 2 and its subdivisions (B) and (A) were in themselves violative of the National Copyright Act because the said sections and subsections were obviously enlargements to and permissive additions to the National Copyright Act, rather than in derogation thereof, and were enacted as a proper and legal exercise of the police power of the Legislature of the State of Nebraska to protect its citizens against fraud and unlawful practices of ASCAP when dealing in the public performance rights for copyrighted musical compositions.

[fol. 130]

VIII

The Court erred in granting the permanent injunction when the appellees had a plain, adequate, and speedy remedy at law, and especially so when the enforcement provisions of the Act, to-wit: Sections 9, 10, 11, and 13 provide for full and complete hearings in the regularly constituted courts of the state and no summary action was permitted under the terms of the Act.

IX

The Court erred in granting the permanent injunction because in doing so it violated the well-established principle of law announced by the Supreme Court of the United States that the limited individual monopolies granted to patent or copyright owners do not exempt them from the prohibitions of anti-trust legislation when it appears that the combining patent or copyright owners effectively dominate industry, because the power to fix royalties for licenses is tantamount to the power to fix prices in violation of the anti-trust legislation.

Explanation: (Only in the Court's opinion of December 28, 1939, was the entire Act held void because of the invalidity of Section 2 (B) as above set forth. In the findings of fact, conclusions of law, and decree of January 25, 1940, the entire Act was held invalid and non-enforceable although no part thereof was held repugnant to the copyright law, and no mention or reference was made to Section 2 (B), as the only invalid part, as was done in the opinion of December 28, 1939, and no determination of unconstitutionality made in said papers of 1/25/40.

Thus appellants now proceed with the following assignment of errors based upon omissions in the findings of fact, conclusions of law, and decree of January 25, 1940.)
(*Buck v. Swanson*, 33 Fed. Supp. 377.)

X

The Court erred in failing to find in its findings of fact of January 25, 1940, the following additional, definitely proven, material matters appearing of record because the omission thereof affected the material rights of the appellants on the issue of monopolistic practices amounting to fraudulent practices indulged in by ASCAP:

[fol. 131] (These facts are of necessity at this point indexed to the original record of the evidence and are referred to by original page number from the record of testimony taken at the trial.)

(1) That, contrary to its claim of being a protective association for its members, ASCAP is a very substantial business organization paying \$30,000 a year rental for its New York office (O. R. 160).

(2) That it pays each of its officers Buck and Mills \$50,000 annually together with large bonuses and other emoluments, and to its Secretary Pain \$25,000 per year (O. R. 69-70; 500-501).

(3) That no fee or license is charged the radio networks dealing in interstate commerce but only the local radio station for such public performance as ASCAP compositions as are reproduced or presented originally in the Nebraska studios (O. R. 160-161).

(4) That the entire operations of ASCAP are so carried on as to be within the state as intra-state transactions

obviously and ostensibly to avoid, in the slightest degree, interference with interstate commerce (O. R. 385-391; O. Ex. 54).

(5) That over 100 infringement suits were instituted by ASCAP in the past ten years in the Nebraska Federal Courts, all of which were dismissed when and if contracts were signed by the users with ASCAP (Pl. Ex. 62 and Def. Ex. 56), on ASCAP's terms.

(6) That there has been a gradual enlargement in the fees charged year by year; and that the users of music are helpless and must pay the price dictated by ASCAP if they use music commercially in their business enterprises (O. R. 338; 329; 355).

(7) That many thousands of dollars are invested by the users of music in the State of Nebraska in theaters, broadcasting stations, hotels, amusement parks, halls, and pavilions; and that these investments would be adversely affected without the use of music of the type and kind controlled almost exclusively by ASCAP (O. R. 350; 404; 461-2).

(8) That the classification committee of ASCAP (Its Art. of Assoc. P. Ex. 3) divides one-half the net income to composer members, classifying them arbitrarily in groups so that approximately 100 to 150 of the composer members receive approximately all of the composer money; that these funds are annually paid as if dividends or earnings, and not as royalties to each composer on his music. (O. R. 62-8; 71-75; 173; Pl. Ex. 3, page 13).

[fol. 132] (9) That the radio broadcasting companies in Nebraska are compelled, in contracting with ASCAP, to pay it 5% of the station's entire gross receipts; no matter from what source received, together with a sustaining fee, irrespective of whether the radio station used ASCAP or any other music, or no music, on a particular program (O. R. 403-6; 478-9).

(10) That ASCAP refused to furnish the list of its compositions, the public performance rights of which it claimed to control, so that the user might protect himself against an innocent infringement in his establishment (O. R. 374; 468; 414; 393).

(11) That the facts admitted by appellees in their petition and by their exhibits attached and made a part thereof, when applied to the Act also set forth in the petition, were sufficient admissions of facts by appellees to legally ground an order of dismissal moved for by the appellants in August of 1937, but overruled on November 13, 1937, and to which exceptions were taken and filed on November 18, 1937.

XI

The Court erred in its opinion of December 28, 1939, when commenting upon Section 2 (B), which applied separately to the *individual* composer and his publisher, as specifically set forth, by holding:

“While the power reasonably to restrain unlawful monopolistic trade-restraining combinations from exercising any rights in the state may be conceded, an act which compels the owner of a copyright to offer it for sale in a certain way, and if he fails so to do to take it from him without compensation violates the due process and equal protection clauses of the Constitution, and it is also violative of the Federal Copyright Act”,

because Section 2 (A) of the Act provides that the said individual composer and his publisher may, only if he or they wish, grant public performance rights, and when they do shall fix the price therefor upon their music when sold, and collect for it in the same manner as they do for their royalties on all sheet music; and because Section 2 (C) protects the individual copyright owner by prohibiting others from publishing, copying, vending, or selling the [fol. 133-140] composition containing the public performance rights to others when so purchased, with full protection of the National Copyright Law specifically provided in Section 2 (A).

XII

The Court erred in holding in reference to said Section 2 (B) in its findings of fact of January 25, 1940, that:

“The Statute can not possibly be complied with because, among other things, under their respective contracts with the authors and composers, the publisher-members of the Society (including publisher complainants) have the right

to and do give away and distribute free of charge, professional copies of the compositions copyrighted by said publisher-members within the State of Nebraska; this is a practice in the business and is done to create a desire for such compositions on the part of the public, make said compositions popular and give them commercial value",

because the statute in no way prohibits the giving away of copyrighted musical compositions with or without public performance rights; that such arrangement, if indulged in, would be a simple matter of contract between the composer and his publisher and is extraneous to the issues involved in this case, and in no manner violative of the Copyright Act or the Nebraska Act.

XIII

The Court erred in granting the permanent injunction when it did not directly or indirectly in any part of its findings of fact, conclusions of law, or decree of January 25, 1940, state, find, conclude, or decree that the Nebraska act in question was violative of any provisions of the Federal or State Constitution or of the National Copyright Act.

XIV

The Court erred in failing to correct its decree of January 25, 1940, for the additional reasons set forth in appellants' motion for rehearing filed February 5, 1940, which reasons and grounds are made a part of this assignment of error as if copied verbatim herein.

Respectfully submitted, Walter R. Johnson, Attorney General of Nebraska, Lincoln, Nebraska. John Riddell, Assistant to the Atty. Gen. of Nebraska, York, Nebraska. William J. Hotz, Special Assistant to the Atty. Gen. of Nebraska, 1530-5 City Nat'l. Bank Bldg., Omaha, Nebraska.

[fol. 141] IN UNITED STATES DISTRICT COURT

No. 562 Eq.

MEMORANDUM OPINION—Filed November 13, 1937

PER CURIAM:

The plaintiff, Gene Buck, as an individual and as President of the American Society of Composers, Authors and

Publishers, brought suit against Harry R. Swanson, as Secretary of State of Nebraska and against certain other state and county officials, seeking to enjoin the defendants from enforcing the provisions of an act of the legislature of Nebraska, approved May 17, 1937 (Nebraska Session Laws 1937 page 488). That Act makes it unlawful for authors, composers, proprietors, publishers or owners of copyrighted musical compositions, when the members, stockholders or interested parties constitute a substantial number of persons, firms or corporations within the United States who own or control copyrighted musical compositions, to form any organization, either in Nebraska or elsewhere, if one of the objects of the organization is the determination of license fees required for the use of copyrighted musical compositions for profit in Nebraska, for the purpose of preventing free competition between different copyright owners. There are provisions penalizing any attempt to collect license fees by owners of copyright, and requiring any author, composer or publisher, to specify on any published musical composition prepared for use in Nebraska, the selling price of such composition. Many other provisions seek to limit the rights of copyright owners or licensees to control the sale, reproduction or use of their products in the state of Nebraska. The plaintiffs have alleged that the [fol. 142] enforcement of the Act will violate rights granted to them by the Copyright Act of Congress (17 U. S. Code, Section 1, et seq.) and that the Act is in violation of Section 8 of Article 1 of the Constitution of the United States, and also impairs the terms of existing contracts held by the plaintiff.

It is alleged that the defendants have threatened to and will enforce the provisions of this Act, to the great damage of the plaintiffs unless restrained by an order of this court. The application for a temporary injunction has been submitted upon the complainants' bill, and upon certain affidavits filed, and also upon the defendants' motion to dismiss the bill of complaint.

On consideration of the bill, it appears that there is a grave doubt of the constitutionality of the Act of the Legislature, and the plaintiffs have shown that serious and irreparable injury will be inflicted upon them if a preliminary injunction is not awarded to them and that the plaintiffs have no adequate remedy at law. A preliminary injunction, upon the usual terms, will protect both parties, pending a

final decision. An order will, therefore, be entered granting a preliminary injunction. The motion to dismiss the plaintiffs' bill will also be denied.

[fol. 143] IN UNITED STATES DISTRICT COURT

INJUNCTIONAL ORDER—Filed November 13, 1937

This cause came on to be heard at this term, under Section 380, Title 28 U. S. C. A. (Jud. Code Sec. 266), and the Court sat as provided therein, and the cause was argued by counsel; thereupon, upon consideration thereof, it was ordered and adjudged, as follows, viz.:

1. That the motion made by the complainants for temporary injunction, be, and the same is hereby, in all respects, granted.

2. That defendants, Harry R. Swanson, individually and as Secretary of the State of Nebraska, Walter H. Jensen, individually and as State Treasurer of the State of Nebraska, William H. Price, individually and as Auditor of Public Accounts of the State of Nebraska, Richard C. Hunter, individually and as Attorney General of the State of Nebraska, James T. English, individually and as County Attorney of Douglas County, State of Nebraska, Max G. Towle, individually and as County Attorney of Lancaster County, State of Nebraska, Grace Ballard, individually and as County Attorney of Washington County, State of Nebraska, S. S. Diedrichs, individually and as County Attorney of Lincoln County, State of Nebraska, Raymond B. Morrissey, individually and as County Attorney of Johnson County, State of Nebraska, Maynard N. Grosshaus, individually and as County Attorney of York County, State of Nebraska, Charles H. Hood, individually and as County Attorney of Saunders County, State of Nebraska, Alvin B. Lee, individually and as County Attorney of Valley County, State of Nebraska, Gerald J. McGinley, individually and as County Attorney of Keith County, State of Nebraska, Floyd Lundberg, individually and as County Attorney of Kearney County, State of Nebraska, Edwin Moran, individually and as County Attorney of Otoe County, State of Nebraska, and the respective agents, servants and employees of each

of them, and all other persons acting under or through the authority of each of them, or by virtue of the authority of the office of each of them, be, and they are, each of them, [fol. 144] severally, enjoined and restrained, pendente lite, and until the further order of this Court, from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding, at law or in equity, for the purpose of enforcing or executing the Statute of Nebraska, known as Legislative Bill No. 478, passed by the Fifty-second Session of the Legislature of Nebraska, and signed by the Governor on May 17, 1937, and made effective immediately (said Statute hereinafter referred to as the "State Statute") against the complainants and others similarly situated, their representatives, employees, agents or any of them, and from demanding that copies of musical compositions of complainants and others similarly situated, be filed, and from bringing any action or proceeding to adjudicate the ownership of copyrighted musical compositions owned by the corporate or individual complainants or others similarly situated, and from attempting to appoint or take any steps leading to the appointment of a receiver, and from interfering with any and all existing contracts heretofore entered into between complainants and citizens and residents of the State of Nebraska, and between the American Society of Composers, Authors and Publishers and the other complainants, or any of said Society's members, and between the American Society of Composers, Authors and Publishers and similar societies located in foreign countries, and between the complainant composers and authors and their respective publishers, and between the complainant publishers and their respective authors and composers, and from threatening to enforce against any citizens or residents of the State of Nebraska, the penalties of such State Statute, in the event such citizens and residents desire to carry out their contracts with the said American Society or other complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives or agents, or any of them, or others similarly situated, for doing any act or thing to detect infringement and to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Nebraska, or elsewhere, and generally [fol. 145] from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

3. That the motion made by the defendants herein to dismiss the bill of complaint herein, be, and the same is hereby, in all respects denied.

4. That the defendants be given thirty days from the date hereof to answer herein.

5. The court finds that unless an injunctive order of this nature be issued, the plaintiffs would be irreparably damaged and that plaintiffs have no adequate remedy at law. This order is made conditional upon the filing herein within 30 days of an approved bond by the plaintiff, in the penal sum of Five Thousand (\$5,000) Dollars conditioned upon the payment to the defendants of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined by this order, such damages to be ascertained as the court may direct.

Archibald K. Gardner, United States Circuit Judge.

Dated Nov. 10, 1937.

Thos. C. Munger, United States District Judge.

Dated Nov. 13, 1937.

J. A. Donohoe, United States District Judge.

[File endorsement omitted.]

[fol. 146] IN UNITED STATES DISTRICT COURT

DISTRICT OF NEBRASKA—LINCOLN DIVISION

[File endorsement omitted.]

Before Archibald K. Gardner, Circuit Judge, Thomas C. Munger, District Judge, and James A. Donohoe, District Judge, sitting pursuant to Section 266 of the Judicial Code.

OPINION—Filed December 28, 1939

GARDNER, Circuit Judge, delivered the opinion of the Court:

This is a suit in equity in which plaintiffs seek to enjoin the enforcement of Legislative Bill 478 of the State of Nebraska, and which by its terms became effective May 17, 1937.

The American Society of Composers, Authors and Publishers, a voluntary unincorporated association under the

General Associations Law of New York, consisting of a large number of persons, firms and corporations who own or control copyrighted vocal or instrumental musical compositions, as authors, composers and publishers, through Gene Buck, its president, and certain individuals and corporations interested in copyrighted musical compositions are the plaintiffs. The secretary of state, the state treasurer, the auditor of public accounts, and the attorney general, all of the State of Nebraska, as well as the county attorneys of various counties of Nebraska, are the defendants.

The statute, the enforcement of which is sought to be enjoined, is too voluminous to be set out herein in haec verba, but it will be found in the subjoined note.

(Here follows Legislative Bill No. 478 Final Form on Third Reading.)

[fol. 147] There are approximately 1000 composer members of the American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP, in the United States, and 123 publisher members who constitute the principal publishers of the country. Each member has assigned to the society the conclusive right of public performance for profit of his copyrighted musical compositions for periods of five years at a time, the present contracts between the society and its members expiring December 31, 1940. The society has issued blank licenses to the users of its copyrights, by which the latter are permitted to perform publicly for profit at any time, all the musical compositions owned, written or composed by members of the society without requiring further consent of the owner of the particular composition performed. These blanket licenses include not only the right to perform the works of the members of the society, but also grant the right to perform the works of some 44,000 members of other similar societies throughout the civilized world, with which societies ASCAP has contracts authorizing such licenses.

In Nebraska there are some 350 dance pavilions and ball-rooms of a class that are independent of taverns where dancing is carried on incidentally. There are ten radio stations operating within the State, of which one is affiliated with the Columbia Broadcasting Network and one with

the National Broadcasting Network. The other stations initiate their own vocal and instrumental musical programs. A large number of theaters are users of music. There are 284,000 radio receiving sets in private homes, and about one-third of the population of the state at some time during the year attend dances and balls where music is played. In 1938 approximately \$12,000.00 was collected by ASCAP from the theaters in the state. The largest radio station in Nebraska pays about \$26,000.00 to the society annually. Another group of stations paid the society about \$27,000.00 in 1938. There are 391 signed contracts with users of music in Nebraska introduced in evidence, upon which an aggregate of approximately \$20,000.00 was paid ASCAP during 1938. The society is given, by its members, the exclusive right to make collections, fix prices, and otherwise carry [fol. 148] on the public performance of all the musical compositions it controls. Some \$6,000,000.00 was taken in for public performance rights by the society in the United States during 1938. Fifty per cent of its net commissions was divided among the composer members and the other fifty per cent was divided among the publisher members. These groups are classified, but the classification does not seem to have any material bearing upon the issues presented. Of the popular music necessary for the successful operation of radio stations, dance halls, hotels, and theaters, the society has control of about 85% or 90% and also has control of from 50% to 75% of the standard or older music that is played occasionally. All of the large and more influential publishers of music in the United States are members of the society. The users of music in Nebraska can not successfully carry on their business except they deal with the plaintiff society because there is no place where nor person or agency to whom users of music in Nebraska may go in order to deal for public performance rights and negotiate for music in any substantial amount sufficient to meet the ordinary needs of music users in the state, except the society.

All the contentions of plaintiffs, as well as those of the defendants, go to the constitutional validity of the statute involved. Whether or not, under the common law of Nebraska the contracts between ASCAP and its members, and between it and the users of music in Nebraska, are valid or not, we need not consider. That issue is not before us, but

the single question is the constitutional validity of the challenged statute.

It appears from the evidence that prior to the organization of the plaintiff society, an author or composer who had obtained a copyright for his production had no practical means of enforcing the exclusive right given him by the Copyright Act. He was not so equipped nor organized to discover violations of his rights, and it would require much time and a large amount of money to enforce his rights by means of litigation. Users of music, on the other hand, who wished to buy the rights of public performance for profit, [fol. 149] were unable to ascertain who the copyright owner was and to whom to go. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit that the society was organized.

The control or prohibition of combinations in restraint of trade and the prohibition of monopolistic practices is recognized as a proper exercise of the police power of the state. *Nebbia v. New York*, 291 U. S. 502; *Waters-Pierce Oil Co. v. Texas*, 197 U. S. 115; *Dayside Fish Flour Co. v. Gentry*, 297 U. S. 422; *Crescent Cotton Oil Co. v. Mississippi*, 257 U. S. 129; *Central Lumber Co. v. South Dakota*, 226 U. S. 157; *Paramount Pictures v. Langer* 23 Fed. Supp. 890. While regulation of such public practices as are deemed to be contrary to the public policy of the state is a proper exercise of its police power, yet the exercising of such power is subject to the restrictions imposed by the Federal Constitution, which must, of course, be recognized as the supreme law of the land. A State Statute, though enacted in pursuance of the police power, is void if in contravention of any express provision of the Federal Constitution or of a valid federal statute, or if it constitutes an interference with matters that are within the exclusive scope of federal power.

The Act of March 4, 1909, Chap. 320, Sec. 1 (E), 35 Stat. 1073, Title 17 U. S. C. A. Secs. 1-63, enacted pursuant to the grant of power in Article I, Section 8 of the Constitution, was intended to grant valuable enforceable rights to authors and publishers without burdensome requirements, in order to afford greater encouragement to the production of literary works of lasting benefit to the world. *Washingtonian Pub. Co. v. Pearson* 306 U. S. 30. The policy and purpose of the statute is to grant to the individual the right

to control the use of the production covered by the copyright. Of course, the Act gives him no right to combine with others to insure control of prices and the consequent power of monopoly of an entire field by combination. Plaintiffs urge necessity as a justification or warrant for their organization. It is urged that without some such means of [fol. 150] protection, the individual copyright owner is helpless to protect his rights, but if the statute violates no rights guaranteed to the plaintiffs by the Constitution or laws of the United States, the motive for the organization or acts of ASCAP, however, impelling, is not material.

It is contended that the state statute deprives copyright owners of the right to control public performance for profit of their copyrighted musical compositions, apart from the sale of sheet music. The copyright is distinct from the material object copyrighted. It is an intangible incorporeal right in the nature of a privilege or franchise quite independent of any material substance such as the manuscript or the plate used for printing. *King Feature Syndicate v. Fleischer* (CCA2) 299 Fed. 533. The owner of the copyright has the right to dispose of it on such terms as he may see fit, or he may decline to dispose of it on any terms. He has an individual right of exclusive enjoyment similar to that of a patentee of an invention. *United States v. Dubilier Condenser Corp.* 289 U. S. 178; *United States v. American Bell Telephone Co.* 167 U. S. 224; *Burrow-Giles Lithograph Co. v. Sarony* 111 U. S. 53; *American Tobacco Co. v. Werckmeister* 207 U. S. 284; *Caliga v. Inter Ocean Newspaper Co.* 215 U. S. 182; *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.* (CCA7) 154 Fed. 358. The society as an assignee of the rights of each author is a representative of that individual right. There are too, individual plaintiffs before the courts, and they are interested individually in the public performance rights of particular musical compositions. In *American Tobacco Co. v. Werckmeister*, *supra*, it is said:

“ * * * the law recognizes the artistic or literary productions of intellect or genius, not only to the extent which is involved in dominion over and ownership of the thing created, but also the intangible estate in such property which arises from the privilege of publishing and selling to others copies of the thing produced.”

While the Copyright Act may not enhance the right of proprietorship, it certainly does not lessen that right. As said by the Supreme Court in *Caliga v. Inter Ocean Newspaper Co.*, *supra*,

[fol. 151] "The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period."

The right of an author in his intellectual production is similar to any other personal property right. It is assignable and it may be sold and transferred in its entirety, or a limited interest therein, less than the whole property, may be sold and assigned, and the various rights included in the entire ownership may be split up and assigned to different persons. Sales may be absolute or conditional and they may be with or without qualifications, limitations or restrictions, *Atlantic Monthly Co. v. Post Pub. Co.* (D. C. Mass.) 27 Fed. (2d) 556; *American Tobacco Co. v. Werckmeister*, *supra*.

Section 2 (a) of the state statute requires the author, composer or publisher to specify legibly upon the musical composition, in whatever form it may be published, "the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes."

The right of public performance in connection with the composition includes separate and distinct rights, among them being: (1) the right of publication; (2) the motion picture rights; (3) the stage rights; (4) the recording rights; and (5) the radio reproduction rights. The copyright owner might wish to grant one of these rights to one party and another right to a different party. As the exclusive owner, he is entitled to that right. The above statute, however, interferes with his so doing.

Section 2 (b) of the Statute provides that,

"In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private and public performance for

profit within this state without further license fee or other exaction; and such person, firm or corporation, so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state."

Under this subsection, the copyright owner in effect must offer the public performance rights of his copyrighted composition for sale and use in Nebraska, and if he does not choose so to do any person purchasing the composition may use it in the state for public performance without any liability to the copyright owner. This provision, we think, clearly deprives the owner of the copyright of rights to which he is entitled under the Copyright Act. As observed, his rights of ownership entitled him to sell or offer to sell, or to withhold from sale, as he may choose.

The state statute cannot be justified as a method of exercising the police power. The police power may not be extended to the extent of taking private property for a public use. *Panhandle Eastern Pipe Line Co. v. State Highway Commission* 294 U. S. 613.

While the power reasonably to restrain unlawful monopolistic trade-restraining combinations from exercising any rights in the state may be conceded, an act which compels the owner of a copyright to offer it for sale in a certain way, and if he fails so to do to take it from him without compensation, violates the due process and equal protection clauses of the Constitution, and it is also violative of the Federal Copyright Act.

The state statute contains a separability provision (Section 12), which provides that,

"If any section, subdivision, sentence or clause in this Act shall, for any reason, be held void or non-enforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act."

The Supreme Court of Nebraska has held that a statutory expression of the separability of various sections or provisions of a statute is an aid merely to judicial interpretation. *First Trust Co. v. Smith* (Neb.) 277 N. W. 762; *Laverty v. Cochran* (Neb.) 271 N. W. 334; *Hubble Bank v. Bryan* (Neb.) 245 N. W. 20. In *Laverty v. Coch-*

ran, *supra*, the court in speaking of a severance clause contained in a statute said:

"The rule is that, although a statute may be invalid or unconstitutional in part, the other parts will be sustained where they can be separated from the part which is void. *Muldoon v. Levi*, 25 Neb. 457, 41 N. W. 280. But the parts of the statute which are invalid must be capable of being executed independently of the invalid parts in order to be operative. *State v. Ure*, 91 Neb. 31, 135 N. W. 224. The statutory provision expressing legislative intent as to the separability of the various parts of a statute is merely an aid to judicial interpretation."

But where the connection between the invalid parts and the other parts of the statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts, the whole act must be held inoperative. The provision of the statute which we are here considering is such an essential part of the statute as not to be separable.

In view of our conclusion on this phase of the case, it is unnecessary to consider the other contentions that have been ably argued and elaborately briefed by counsel for the respective parties.

We conclude that permanent injunction restraining the enforcement of this statute must be granted. Counsel for plaintiffs may prepare findings of fact and conclusions of law, together with form of decree in accordance with this opinion.

[fol. 154]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

No. 562 Eq.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed January 25, 1940

This suit have been duly commenced on June 8, 1937, by filing a subpoena and bill of complaint in this Court, and personal service of copies thereof having been made on said date upon all the defendants, except the defendants John Havekost, Ray C. Johnson, Walter R. Johnson, Wil-

liam T. Gleason, Zelma Derry, Rush C. Clarke, "John Doe" and "Richard Roe," (Said John Havekost having been substituted by stipulation in place and stead of Walter H. Jensen, said Ray C. Johnson having been substituted by stipulation in place and stead of William H. Price, said Walter R. Johnson having been substituted by stipulation in place and stead of Richard C. Hunter, William T. Gleason having been substituted by stipulation in place and stead of Charles H. Hood, Zelma Derry having been substituted by stipulation in place and stead of Gerald J. McGinley) and this Court having duly granted a temporary injunction on November 13, 1937, and defendants thereafter having duly filed their answer on November 18, 1937, and this cause having come on for trial on the 18th, 19th, [fol. 155] 20th and 21st days of September, 1939, at the District Court of the United States, District of Nebraska, Lincoln Division, in the Federal Post Office Building, City of Lincoln, Nebraska, and complainants having appeared by L. J. TePoel, Esq. (Louis D. Frohlich, L. J. TePoel and Herman Finkelstein, of Counsel), and defendants having appeared by W. R. Johnson, Attorney General (William J. Hotz, John Riddell and Andrew Bennett, of Counsel), and evidence having been adduced upon the merits of this case, and due deliberation having been had, and the Court having filed its opinion, hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The State of Nebraska enacted Legislative Bill No. 478 which became effective May 17, 1937. Said Statute is hereinafter referred to as the "Statute."

2. The plaintiff American Society of Composers, Authors and Publishers, is a voluntary unincorporated association organized in 1914 under the General Associations Law of New York. Its membership consists of a substantial number of persons, firms and corporations who own or control copyrighted vocal or instrumental musical compositions as authors, composers and publishers. It brings this suit through Gene Buck, its President, who has been duly authorized to bring this suit on behalf of the Society and all its members. Other plaintiffs are certain individuals and corporations who are members of the Society and are interested in copyrighted musical compositions. They are all citizens and residents of States other than Nebraska.

3. The Secretary of State, the State Treasurer, the Auditor of Public Accounts, and the Attorney General, all of the State of Nebraska, as well as the County Attorneys of various Counties of Nebraska, all citizens and residents of Nebraska, are the defendants.

4. There are approximately 1,000 composer-members of the American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP, in the United States, and 123 publisher-members who constitute some of the principal publishers of the country. Each member has as [fol. 156] signed to the Society the exclusive right of public performance for profit of his copyrighted musical compositions for periods of five years at a time, the present contracts between the Society and its members expiring December 31, 1940. The Society has issued blanket licenses to the users of its copyrights, by which the latter are permitted to perform publicly for profit at any time, all the musical compositions owned, written or composed by members of the society without requiring further consent of the owner of the particular composition performed. These blanket licenses include not only the right to perform the works of the members of the Society, but also grant the right to perform the works of some 44,000 members of other similar societies throughout the civilized world, with which societies ASCAP has contracts authorizing ASCAP to grant such licenses.

5. At the time the Statute was enacted, there were in existence 391 signed contracts between the Society and establishments in the State of Nebraska, engaged in the business of publicly performing copyrighted musical compositions for profit. During the year 1938, these licensees paid the Society \$68,789.54 pursuant to such contracts (Ex. 17). Among such licensees of the Society were the owners of 250 motion picture theatres, 107 dance halls and miscellaneous establishments, 10 radio broadcasting stations, and 24 hotels and restaurants. Among the 10 radio stations in Nebraska licensed by the Society, one is affiliated with the Columbia Broadcasting System and one with the National Broadcasting Corporation. Part of the program broadcast by the two affiliated stations emanate from point-outside of the State and the remaining part initiate in the studios of such Nebraska broadcasters or elsewhere within the State. The other eight stations initiate all their own

vocal and instrumental musical programs. There are 284,000 radio receiving sets in private homes in the State of Nebraska. No license fees are paid by the owners of these receiving sets inasmuch as they do not engage in public performances for profit. About one-third of the population of the State at some time during the year attend dances and balls where music is played. In 1938, approximately \$12,000 was collected by ASCAP from 250 motion picture theatres in the State. In 1938, all the radio broadcasting stations in the State of Nebraska paid the Society approximately [fol. 157] \$48,700. The largest radio station in the State pays about \$22,800 to the Society annually. Another group consisting of three stations, paid the Society an aggregate of about \$31,700 in 1938. The costs of operation of the Society is approximately 20% of the gross amount received (Ex. 17 and 18).

6. The Society is given by its members the exclusive right to make collections, fix prices for blanket licenses, and otherwise carry on the licensing of the right of public performance for profit of all the musical compositions copyrighted by its members. Some \$6,000,000 was received for public performance rights by the Society from such licensing in the entire United States during 1938, of which approximately 20% was used to defray all expenses, the balance being distributed among its members. 50% of such net income was divided among the composer- and author-members and the other 50% was divided among the publisher-members, in accordance with a method of classification defined in the Articles of Association of the Society.

7. Prior to the organization of the plaintiff Society, authors, composers and publishers who had obtained copyrights for their productions had no practical means of enforcing the exclusive right given them by the Copyright Act. They were not so equipped nor organized to discover violations of their rights, and it would require much time and a large amount of money to detect infringement and to enforce their rights by means of litigation. Few of them secured any substantial revenue from the public performance for profit of their copyrighted musical compositions. Users of music, on the other hand, who wished to obtain the rights of public performance for profit, were unable to ascertain who the copyright owner was and to whom to go and could not economically obtain individual licenses

for the separate performance of the large numbers of works required by them daily. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit and to give users ready access to a substantial repertoire of music for such purposes that the Society was organized.

[fol. 158] 8. The Society and its members, including the other complainants, come within the purview, terms, conditions, penalties, forfeitures, prohibitions, restrictions and regulative provisions of the Statute, and the members of the Society including complainants are affected in their rights by the terms and provisions thereof.

9. Complainants are jointly interested in the subject of the action and in obtaining the relief demanded; the questions raised by the Bill of complaint are of common and general interest to all the members of the Society who constitute a class so numerous to make it impracticable to bring them before the Court; complainants herein are suing on their own behalf and on behalf of all the members of the Society.

10. The value of the matter in dispute herein between each of complainants and defendants is in excess of the sum of \$3,000.00, exclusive of interest and costs, as appears from the evidence in this case and the stipulation of the parties entered into in open Court.

11. The Society has control of from 85 to 90% of the popular music necessary for the successful operation of radio stations, dance halls, hotels and theaters, and has control of from 50 to 75% of the standard or older music that is played occasionally at such places.

12. The contracts between the individual composer and author members of the Society, including the individual plaintiffs, and their respective publishers do not give the publisher the right to dispose of the right of public performance for profit, nor do they have any provision for payment by the publisher to the writers of any royalties secured from issuing such licenses. Before the Society was formed, there were no substantial royalties from this source and since the formation of the Society, both writers and publishers have relied upon the Society to collect royalties

from this field on behalf of both and to distribute it equitably for the equal benefit of writers and publishers.

13. The Society's practice has been to grant blanket licenses to theaters according to their seating capacity, to radio broadcasting stations according to their income, power and coverage, and to hotels, cabarets and dance halls according to their respective size, business done, number and size of orchestras, methods of performance, income and standing. Certain of such users have for many years [fol. 159] consistently refused to pay license fees to the Society or its members, until investigations were made by the Society, infringements ascertained and suits brought.

14. The radio broadcasting stations in the State of Nebraska are members of the National Association of Broadcasters, which association on behalf of its members, for many years last past, has acted and presently acts collectively in dealing with the Society.

15. Under the contracts between the Society and said foreign societies, the latter are not required to, and never have, filed with the Society or with any State Authority, copies of the respective compositions copyrights by their respective members.

16. Many thousand of the copyrighted musical compositions owned and published by complainants, as well as others similarly situated, have been recorded under the compulsory license provision of Section 1 (e) of the Copyright Act by manufacturers of phonograph records, music rolls and electrical transcriptions. Such manufacturers have paid to copyright owners not more than two cents for each record and said copyright owners have no right to demand any further sums from such manufacturers; complainants and others similarly situated have no control over the sale or disposition of such phonograph records, music rolls or electrical transcriptions and they can not compel the manufacturers thereof to affix any price upon them or to collect a price for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected respectively for the public performance for profit thereof. Such manufacturers have no right, title or interest in the public performance for profit of such copyrighted compositions.

17. Complainants and other similarly situated are not willing to permit their musical compositions to be performed within the State of Nebraska publicly for profit on any basis wherein the price for such performance would be included in the price paid for a copy of the sheet music, phonograph record, music roll, electrical transcription or sound track thereof.

18. The musical compositions of the Society's members and complainants have been for many years last past, and are presently being performed within the State of Nebraska in hotels, dance halls, taverns, motion picture theaters and [fol. 160] broadcasting stations.

19. The Statute can not possibly be complied with because among other things, under their respective contracts with the authors and composers, the publisher-members of the Society (including publisher-complainants) have the right to and do give away and distribute free of charge, professional copies of the compositions copyrighted by said publisher-members within the State of Nebraska; this is a practice in the business and is done to create a desire for such compositions on the part of the public, make said compositions popular and give them commercial value.

20. Defendants have threatened to and will enforce such Statute against these complainants and others similarly situated in the event that such complainants and others similarly situated refuse to comply with said Statute or do any of the acts made unlawful by said Statute.

21. Said Statute is in its terms so drastic, and the penalties attached to the violation of the terms thereof are so great, that complainants have no adequate means of testing the validity of the Statute by violating the same and defending against a criminal or civil prosecution in the courts of the State of Nebraska; if complainants attempt to issue licenses or collect from licensees or attempt to detect infringements of their copyrighted works in the 93 counties of the State of Nebraska where their works are being publicly performed for profit, they will be subjected to a multiplicity of suits and prosecutions; unless defendants are restrained, complainants will be unable to secure any compensation for the public performance for profit of their respective copyrighted musical compositions within the State of Nebraska.

22. Complainants have no adequate remedy at law and are relievable only in this court of equity.

[fol. 161] CONCLUSIONS OF LAW

1. On the Findings of Fact, the court concludes as a matter of law that complainants are entitled to a decree permanently enjoining the defendants, their deputies, their successors in office, and all persons acting for or on behalf of them, or either of them, and each of them, from bringing or permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said statute against complainants and others similarly situated, their representatives, employees, agents, or any of them, and from prosecuting criminally any members of the said American Society of Composers, Authors and Publishers, including complainants, their representatives or agents, or any of them, for violating any provision of said statute.

II. That complainants recover of the defendants their costs and disbursements to be taxed, as provided by law.

Let decree be entered accordingly.

Dated January 25, 1940.

By the Court:

(S.) Archibald K. Gardner, U. S. Circuit Judge. (S.)
Thos. C. Munger, U. S. District Judge. (S.) J.
A. Donohoe, U. S. District Judge.

[fol. 162] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

No. 562 Eq.

FINAL DECREE—Filed January 25, 1940

This cause came on to be heard at this term, under Section 380 Title 28, U. S. C. A. (Jud. Code Sec. 266), on the 18th, 19th, 20th and 21st days of September, 1939, and the Court sat as provided therein; and the cause was tried and testimony taken and argument heard; thereupon, the court

having made its Findings of Fact and Conclusions of Law, upon consideration thereof, it is Ordered, Adjudged and Decreed, as follows, viz.:

1. The temporary injunction order awarded and entered herein on the 13th day of November, 1937 be and the same is hereby made permanent and perpetual.

[fol. 163] 2. That defendants, Harry R. Swanson, individually and as Secretary of the State of Nebraska, John Havekost, individually and as State Treasurer of the State of Nebraska, Ray C. Johnson, individually and as Auditor of Public Accounts of the State of Nebraska, Walter R. Johnson, individually and as Attorney General of the State of Nebraska, James T. English, individually and as County Attorney of Douglas County of the State of Nebraska, Max G. Towle, individually and as County Attorney of Lancaster County of the State of Nebraska, Grace Ballard, individually and as County Attorney of Washington County of the State of Nebraska, S. S. Diedrichs, individually and as County Attorney of Lincoln County of the State of Nebraska, Raymond B. Morrissey, individually and as County Attorney of Johnson County of the State of Nebraska, Maynard N. Grosshaus, individually and as County Attorney of York County of the State of Nebraska, William T. Gleason, individually and as County Attorney of Saunders County of the State of Nebraska, Alvin B. Lee, individually and as County Attorney of Valley County of the State of Nebraska, Zelma Derry, individually and as County Attorney of Keith County of the State of Nebraska, Floyd Lundberg, individually and as County Attorney of Kearney County of the State of Nebraska, Edwin Moran, individually and as County Attorney of Otoe County of the State of Nebraska, Rush C. Clarke, individually and as County Attorney of Scotts-Bluff County of the State of Nebraska, and the respective agents, servants and employees of each of them, and all other persons acting under or through the authority of each of them, or by virtue of the authority of the office of each of them, be and they are, each of them, severally, enjoined and restrained permanently from bringing, directly or indirectly and from permitting to be brought, directly or indirectly, any proceeding at law or in equity, for the purpose of enforcing or executing the statute of Nebraska, known as Legislative Bill No. 478, passed by the Fifty-second Session of the Legislature

of Nebraska, and signed by the Governor on May 17, 1937, and made effective immediately (said statute hereinafter referred to as the "State Statute") against the complainants and others similarly situated, their representatives, employees, agents or any of them, and from threatening to enforce against any citizens or residents of the State of Nebraska, the penalties of such State Statute, in the event such citizens and residents desire to carry out their [fol. 164] contracts with the said American Society or other complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives, or agents, or any of them, or others similarly situated, for doing any legal act to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Nebraska or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

3. That the defendants pay to the Complainants their proper costs herein as taxed by the Clerk of this Court, amounting to the sum of \$——, and now here decreed to the complainants, and that if the same be not paid within thirty days from this date, then at the request of the complainants or their counsel, an execution shall issue for the enforcement of the payment of the said costs.

Dated January 25, 1940.

By the Court: (S.) Archibald K. Gardner, United States Circuit Judge. (S.) Thos. C. Munger, United States District Judge. (S.) J. A. Donohoe, United States District Judge.

[fols. 165-166] Clerk's Certificate to foregoing papers omitted in printing.

[fol. 167] IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL—Filed February 5, 1940

I

The defendants move the Court to grant a new trial in pursuance of Rule 59; or, instead of a new trial, to:

(1) Set aside certain Findings of Fact because clearly erroneous, as provided in Rule 52; and

(2) In pursuance of said Rule 59,

- (a) Amend the Findings of Fact; and
- (b) Make additional Findings of Fact; and
- (c) Amend the Conclusions of Law; and
- (d) Amend and direct the entry of a new Decree; and

(3) Remedy the inconsistencies in the directory opinion of this Court, dated and filed 12/28/39, with the final Findings of Fact, Conclusions of Law, and Decree, dated and filed 1/25/40; and

(4) Grant partial retrial of the factual issue in reference to the inducing cause for passage of the Act in question, referred to in the opinion of 12/28/39; or

(a) Accept the affidavits of a majority of the legislators, filed herewith, and as a part hereof; as Exhibits 1 to 22, and served on the plaintiffs with this motion, as conclusive of the question of what was the inducing cause for the passage of the Act and the separability of the various parts thereof; and

[fol. 168] (5) Grant a partial retrial of the factual issue in reference to public performance rights by one deposition or one short set of interrogatories because the facts in reference to public performance rights are erroneously set forth by the Court and yet are made the dominating basis for the defeat of the entire Act.

(6) Correct all errors in the Court's final Findings, legal Conclusions, and Decree dated 1/25/40, and enter new final papers based upon

- (a) The record as made; and
- (b) The showing accompanying this motion; and
- (c) The law applicable to the issues involved; and
- (d) The new evidence by deposition or interrogatories adduced upon order of this Court under Rule 59 and Rule 52.

[fol. 169]

II

Regarding defendants' lack of opportunity to object to the final Opinion, Findings, Conclusions and Decree.

The defendants state that the opinion of the Court of 12/38/39, as well as the final Findings of Fact, Conclusions of Law, and Decree entered 1/25/40, were filed with no opportunity for the defendants to object, at the time of the

said rulings and orders, and no opportunity was given to defendants to make known their objections to the action of the Court and their grounds therefor; and consequently, as permitted by Rule 46, the defendants move the Court for a specific order ruling that the absence of such objections shall not constitute a waiver by the defendants, nor prejudice the defendants in raising at this time, or in any future proceedings herein, any objection to the said opinion, Findings of Fact, Conclusions of Law, or Decree now on file herein; and that the matters herein set forth as grounds for new trial may constitute the objections, the same and in all particulars as if made known to the Court with the defendants' desires in reference thereto at the time of the rulings of the Court on each of the matters in the motion declared objectionable to defendants' cause.

[fol. 170]

III

Defendants' more specific statements of the grounds set forth in Paragraph I above for setting aside certain Findings of Fact, and amending others, and making different Conclusions of Law and Decree.

1. In the opinion of 12/28/39, on Page 3 thereof, appears the following, which should be stricken:

"Whether or not, under the common law of Nebraska the contracts between ASCAP and its members, and between it and the users of music in Nebraska, are valid or not, we need not consider. That issue is not before us,
• • •"

the question of the alleged illegal ASCAP contracts as defined, and the authorities cited to sustain the same, on Page 23 and 31 in the Conclusions of Law, found in defendants' proposed Conclusions filed 10/4/39, and which are hereby referred to and made a part hereof, should be followed.

2. On Page 5 of the opinion of 12/28/39, appears:

"The Society as an assignee of the rights of each author is a representative of that individual right."

The same should be stricken unless the Court modifies its findings by declaring that the individual monopolistic rights under the Copyright Law do not permit a monopolistic combination as defined in Section 1 of the Act.

3. On Page 6 of the opinion of 12/28/39, the Court attempts to define five (5) separate public performance rights. These definitions do not coincide with those set forth in the Federal Copyright Law, Title 17, U. S. C. A., and therefore should be stricken or corrected to read properly in accordance with the law and evidence. More specific corrective facts should be required by the Court, or the erroneous statement stricken.

4. Strike from the paragraph on Page 6, the following:

"The copyright owner might wish to grant one of these rights to one party and another right to a different party. As the exclusive owner, he is entitled to that right. The above statute, however, interferes with his so doing."

The Act specifically provides, Section 2 (A), that the National Copyright Act is in full force and effect in Nebraska. The defendants admit herein that the interpretation that should be placed upon said Section 2 (A) is that the individual copyright owner may either grant or withhold such of his public performance rights, or all his public performance rights, as he so desires. He may make known the price he wishes for any one or all of the public performance rights he wishes to grant or sell, and make his rights known if he desires to do so. Such requirement is not an interference with the National Copyright Act, and the same only applies to the individual.

Section 2 (C) specifically provides that nothing in the Act shall be construed to give to any purchaser of copyrighted musical compositions the right to "resell, copy, print, publish, or vend the same", which language is copied verbatim from the National Copyright Act, Title 17, U. S. C. A.

5. Strike from Page 7 of the opinion of 12/28/39, the following language:

"Under this subsection, the copyright owner in effect must offer the public performance rights of his copyrighted composition for sale and use in Nebraska, and if he does not choose so to do any person purchasing the composition may use it in the state for public performance without any liability to the copyright owner. This provision, we think clearly deprives the owner of the copyright of rights to which he is entitled under the Copyright Act."

This finding is clearly erroneous as the Act does just the opposite and complies with the Court's finding, in reference to the National Copyright Law, which is as follows:

"As observed, his rights of ownership entitled him to sell or offer to sell, or to withhold from sale, as he may choose."

This last above worded portion of the opinion of this Court of 12/28/39, is precisely the proper interpretation to be placed upon the Nebraska Act in reference to the individual as it specifically provides, and the defendants admit, that the individual copyright owner may withhold from sale, or from offering for sale, as he may choose, or may grant, or withhold any part or all public performance rights, and may do so without any penalty whatever.

[fol. 172] 6. Strike from Page 7 of the opinion the following:

"The state statute cannot be justified as a method of exercising the police power. The police power may not be extended to the extent of taking private property for a public use."

Said wording is in contravention of, and in direct opposition to, the announced findings of the Court on 12/28/39 that ASCAP is an unlawful monopoly acting in restraint of trade; and that it is within the purview of the Nebraska Legislature to bar such an unlawful combination, even though the subject matter is copyrighted musical compositions. Defendants' Conclusions of Law dated 10/4/39, last part of Page 31 to 34, fully confirm the facts and law in opposition to the portion of the opinion above quoted.

7. Strike the reference to Section 2 (B) on Page 6 of the opinion of 12/28/39, and on through to the end of the opinion on Page 8, for the reason that said Section 2 (B) may readily be blue-penciled and eliminated from the Act, and because entirely separable from the balance of the section and from the balance of the Act, and held unconstitutional; that the said Section 2 (B) was not the inducing cause for the passage of the Act, as conclusively appears from the 22 affidavits of the legislators submitted with this motion and attached hereto as Exhibits 1 to 22 and made a part hereof. If said Section 2 (B) is unconstitutional, the same may be so held by the Court and stricken without interference with the main and important features

of L. B. 478, as defined in Section 1 of said Act, because Section 1 is the main feature of said Act in that it deals with the unlawful combination of copyright owners acting in restraint of trade, while Section 2 (A) and Section 2 (B) deal with the individual composer and publisher, and all of Section 2 is separable from the entire balance of the Act. Either Section 2 (A), or 2 (B), or 2 (D), or all three (3) parts, might be stricken from the Act as unconstitutional without in any way interfering with the workability, or the obvious and ostensible purposes of the anti-monopolistic legislation, which is the main title and gist of [fol. 173] the Act.

It is, therefore, inequitable and a denial of the defendants' rights for the Court to hold:

"The invalid parts and the other parts of the statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts."

and therefore

"the whole act must be held inoperative."

The contrary now appears of record by said affidavits of the legislators attached. Furthermore, said issue was not presented by the plaintiffs in the form of evidence; and the Federal Courts should not surmise at the factual questions involved in the passage of state legislation. The plaintiffs introduced no evidence whatever that would justify this Court in holding, but for Section 2 (B) or Section 2 (A) the Act would not have been passed. The affidavits submitted are proof positive to the contrary, and defendants are entitled to a clear finding of fact and conclusion of law accordingly.

8. The defendants have made the foregoing criticisms in reference to the opinion of 12/28/39, rather than the Findings of Fact of 1/25/40, because the Court stated in the concluding paragraphs of the opinion of 12/28/39, as follows:

"Counsel for plaintiffs may prepare findings of fact and conclusions of law, together with form of decree in accordance with this opinion."

This was not accurately done by plaintiffs. While the defendants recognize that final Findings of Fact, Conclusions

of Law, and Decree as filed become the Court's when signed by it, nevertheless, as filed on 1/25/40, they are hopelessly inconsistent with said opinion of 12/28/39.

IV

The following should be stricken from the final Findings of Fact and Conclusions of Law filed 1/25/40.

1. The introductory paragraph on Pages 1 and 2 is not an accurate statement of the appearances of the respective counsel and does not contain, as in said opinion, reference [fol. 174] to L. B. 478 to be printed in the footnotes. The entire Act should be copied in the footnotes verbatim in the same way as provided in the opinion of 12/28/39, and the appearances of counsel listed as shown by the court reporter's record.

2. There should be inserted the word "the" before "person" in Line 4 of Paragraph 2 of the Findings of Fact, and "in the United States" added after the word "corporations", and the words "authors, composers, and publishers" stricken, so that the same shall properly read:

"Its membership consist of a substantial number of the persons, firms and corporations in the United States who own or control copyrighted vocal or instrumental musical compositions."

3. In the last line of Page 2 of Paragraph 4 of the Findings of Fact, the words "some of" should be stricken because the 123 publisher members constitute all of the principal publishers of the country; there should be added to said paragraph the following:

"The publisher members of the Society in almost every instance are the owners of the copyrights, including the rights of public performance for profit."

This is a material finding, and the contracts in evidence (and attached to Bill of Complaint) existing between the composer and the publisher show that the composer transfers to the publisher his public performance rights; in view of the fact that no composer is able to publish his music without the aid and assistance of a publisher, and substantially all the publishing houses in the United States being members of ASCAP, that fact becomes the power of ASCAP's vast control.

The publishers are, in effect, ASCAP; no music can be published by any composer or author of lyrics without a music publisher. The publishers are all in ASCAP. Therefore, no composer can function without ASCAP's consent. The organization thus controls the prices and terms for both the supply (composer) and the demand (user). A finding of these important facts should be made. There is no evidence to the contrary and ample evidence to sustain this feature.

[fol. 175] 4. The Findings of Fact referred to on Pages 18, 19, and 20 of defendants' proposed Findings of Fact of 10/4/39, on file herein, give the proper resume of the important line of evidence last above referred to and which should be so found as an important factor in the case.

5. There should be stricken from Paragraph 5, the seven lines from the bottom of the page, reading as follows:

"No license fees are paid by the owners of these receiving sets inasmuch as they do not engage in public performances for profit."

That was not an issue in the case; no evidence was heard on the subject, and the same is an attempt to have adjudicated by a court "sales talk". ASCAP may be engaging the Court in attempting to lay the ground work for the extension of its monopolistic practices to include private radios, if played, so that they may be heard by the public gathered in the vicinity. A Belgian case (citation will be furnished on request) by an ASCAP foreign affiliate is now so attempting.

6. In the Findings of Fact of 1/25/40, at the end of Paragraph 5 on Page 4, there should be stricken:

"The cost of operation of the Society is approximately 20% of the gross amount received."

The evidence clearly showed that it was at least 22%. It was not a proper subject for a special finding because the interrogatories propounded before trial in that regard were not answered by the plaintiffs. There should be no binding findings or conclusion that 20% is accurate for cost of operation. The same was not gone into by the plaintiffs or defendants, excepting as a conclusion based on an estimate of plaintiffs. It has no material bearing in the case, and the same should be eliminated as prejudicial to the rights

of the defendants; or, the Court, under permissive Rule 52 and 59, should permit that subject to be further gone into by deposition or the questions answered by ASCAP, its books examined, and a proper conclusion reached. However, the pleadings make no issue of cost of operation.

[fol. 176] 7. There should be stricken from Paragraph 7 on Page 4 of the Findings of 1/25/40, the following:

“Few of them secured any substantial revenue from the public performance for profit of their copyrighted musical compositions.”

Further on in the paragraph, there should be stricken:

“and could not economically obtain individual licenses for the separate performance of the large number of works required by them daily.”

and also, there should be stricken:

“and to give users ready access to a substantial repertoire of music for such purposes that the Society was organized.”

There was no evidence introduced on this subject of any probative force, or of evidentiary value; the same was only casually referred to and is not a material issue in the case. It is manifestly unfair to defendants to permit plaintiffs to build sales propaganda in a Court's Findings of Fact.

8. Paragraphs 9, 12, 13, 14, 15, 16, 17, 19, and 21 on Pages 5, 6, and 7 of the Findings of Fact of 1/25/40, should be stricken for the reason that the matters therein are likewise “sales talk” and ASCAP propaganda placed in the findings; the same are baseless conclusions, with no material evidence to support them, and are contrary to the Court's instructions in the opinion of 12/28/39. That said paragraphs are more in the nature of a pleading or bill of complaint and are not, as a matter of practice, in proper language for findings, nor do the paragraphs contain proper matter for findings of fact and can therefore serve no useful purpose. On the contrary, the same are all harmful to the rights of the defendants when it is considered that Findings of Fact of a Trial Court are final truths.

9. Paragraph 22 should be stricken from the Findings of Fact of 1/25/40, for the reason that the plaintiffs do have an adequate remedy at law, as the facts and the evidence

clearly show. The Act in question gives to the plaintiffs full and complete protection in the courts of the State of Nebraska in defense of any charge, civil or criminal, that [fol. 177] may or might be instituted in the enforcement of the Act. No summary proceedings are permitted by the Act. Sections 9, 10, and 11 of the Act give full and adequate protection and due process of law, and equal protection to all.

V

The Conclusions of Law of the Court, filed on 1/25/40, should be stricken because they are not properly drawn, nor are they compiled as defined in the decisions and rules; nor do they contain the supporting authorities and decisions to sustain them. In this regard, the defendants respectfully urge the Court to review the defendants' proposed Conclusions of Law, set forth on Pages 30 to 43, and submitted to the Court, and filed on 10/4/39. Said Conclusions of Law are respectfully referred to and made a part hereof, as if incorporated herein.

VI

The Decree should be stricken and redrawn so as to provide that the Act is enforceable, unless the Court should continue its decision, after further facts on the actual operation of all public performance rights, that Section 2 (B) is non-enforceable because its provisions contravene the Copyright Act; then this Court should amend its Decree so that particular section is non-enforceable. The same might be true of other sections, such as certain parts of Section 2 (A) or Section 2 (D), as well as Section 2 (B). However, the Court should hold that such provisions were not the inducing causes for the passage of the Act; that each one of such subsections as may be invalid may be entirely separated from the main and important features of the Act in reference to the monopolistic control in restraint of trade by ASCAP of the copyrighted musical compositions used in the State of Nebraska.

VII

The defendants move the Court to amend its Findings of Fact to include the following important and material matters clearly and unmistakably in the record:

[fol. 178] 1. That radio stations are charged 5% of their gross receipts exclusive of political speeches and advertising commissions paid, and must be paid irrespective of the kind and form of program and whether ASCAP music is used or not; that blanket licenses only are demanded by and acceptable to ASCAP; that ASCAP refuses radio users a per-piece or per-program charged based upon the ASCAP musical numbers used, excepting in the one instance of the newspaper contract found among the 391 contracts introduced in evidence pertaining to the newspaper owned radio station at Norfolk; that such conduct is discriminatory and unfair to music users; that repeated demands for per-piece or per-program rates have been demanded by radio stations especially, as the evidence clearly shows (J. J. Gillin Testimony), but ASCAP insists, and enforces through its monopolistic control, the blanket license which it demands and which is based upon percentage of gross business done plus a sustaining fee, irrespective of the program (Radio station contracts in evidence).

2. That in the past ten (10) years one hundred (100) lawsuits for copyright infringement were instituted in Nebraska and terminated in dismissals by ASCAP, or the release of judgments by ASCAP, when the defendants signed the blanket license contracts demanded by it and paid the rates therein fixed and determined by ASCAP.

3. That the radio stations in Nebraska are required to enter into contracts with the national networks, which compel the stations in Nebraska to enter into contracts with ASCAP to save them (networks) harmless from infringement. (See Columbia and National contracts in evidence.)

4. That theaters pay ASCAP on the basis of seat capacity and not on whether ASCAP music is used or not used, or how much of it is used in the theater. (See theater contracts in evidence.)

5. That hotels pay on any sort of a basis that the agent of ASCAP in Nebraska can arrange; and the same is true with dance halls, taverns, amusement parks, and similar places, with each of the same at the complete mercy of [fol. 179] ASCAP. (Malec, Hedlin testimony and contracts in evidence.)

6. That the users of music have large investments in Nebraska and must have the music controlled by ASCAP

to protect the same or go out of existence as music users at great inconvenience and loss. (Malec, Gillin, Hedlin, and Searle testimony.)

7. That the National Association of Broadcasters does not speak for the radio stations in Nebraska (Gillin), nor does the National Hotel Association speak for the hotels (Hedlin) in Nebraska. The negotiations for prices are actually accepted in Nebraska, and the contracts signed in Nebraska by the agent of ASCAP operating within the state. (Blazer testimony.)

8. That the composers of music have entered into contracts with their publishers and ASCAP, after which they have no further control in reference to public performance rights that are thus given to ASCAP by the composers and publisher, and are placed in a classification in which the first group, of about 50 composers, receive as much as \$17,500 per year, and the publisher members in the first group \$150,000 per year (Buck, Mills, Paine testimony; all depositions); that the classification is scaled down so that the vast majority of composers belonging to ASCAP receive virtually nothing (Irving Ceasar Deposition); and through the scheme of the publisher members taking one-half of the profits and the selected classification (By-Laws—Complaint) of the upper groups, by the self-perpetuating board of directors, all the income for public performance rights is thus taken and controlled and distributed among a comparative few composers and publishers, and the officers named in the evidence in charge for years back.

9. That the officers receive \$50,000 a year salary and bonuses of \$5,000 to \$8,000; that \$30,000 a year rent is paid in New York for the headquarters (Buck); that ASCAP is a substantial business organization doing business in the State of Nebraska through a local agent known as an attorney at law and in fact (Blazer) and whose name appears on all the contracts for ASCAP.

10. That the purpose of showing that there were 284,000 (Gillin) radio sets in Nebraska and 24 hotels (contracts) and 10 radio stations, and that a third of the population at sometime during the year entertained itself in dancing; and that there are 350 dance halls (Malec) and music rooms in the State of Nebraska, is to prove the matter of the public interest in the matter of copyrighted music within

the State of Nebraska; and defendants are entitled to such finding because the evidence so shows.

11. That it is clear from the evidence that there is no interference with commerce because the networks pay nothing to ASCAP (Contracts) (Mills); that the public performances are all within the State of Nebraska; and that which comes over the wire, sent by the networks, has no usable value whatever until it is reformed by machinery and apparatus and equipment located and operated within the State of Nebraska (Gillin, Searle), and at which time, and only at such time, do the public performance rights attach within the State of Nebraska. Interstate commerce is in no way affected. A Finding of Fact should be made accordingly.

12. The foregoing suggestions in reference to commerce require additional Findings of Fact, and which may be found in the proposed Findings of Fact set out on Pages 13 to 29 inclusive of the defendants' findings submitted 10/4/39, and which are hereby referred to and made a part hereof the same and in all particulars as if copied at length herein.

VIII

As a further grounds for this motion for new trial, the defendants move the reconsideration and adoption by the Court of the Conclusions of Law and the authorities in support set forth on Pages 30 to 43 inclusive of the defendants' proposed conclusions dated 10/4/39.

IX

In reference to the interference of the Nebraska Act with [fol. 181] the National Copyright Law, and therefore unconstitutional, the defendants move for the correction and additions to the Findings of Fact, Conclusions of Law, and Decree in the following manner and for the following reasons, either at this time or after some additional evidence asked for herein above on public performance rights has been furnished.

1. The National Copyright Act was passed in 1909. At that time, radio had not developed, and the use of music in the manner it is used today by hotels, in their rooms, by

taverns, cafes, etc. had not been developed, nor even known. Consequently, the National Copyright Act does not cover many of the new phases of the business. Thus the Act does not prevent a state from passing reasonable regulations for the use of copyrighted material within the State of Nebraska so long as it does not interfere with the free use by the individual. Defendants contend that a monopolistic organization such as ASCAP has no rights under the Copyright Act to combine unlawfully.

2. The deposition of Ella Herbert Bartlett shows that she and her publisher deal in reference to dramatico musical rights by making special deals and special transactions with the moving picture houses, producers, theaters, and others. ASCAP is not interested therein, and those rights are separate and distinct and have no bearing upon or concern in this case; nor are such rights limited or curtailed in any way by the Nebraska Act. Ella Herbert Bartlett, for example (Refer to her deposition), received \$50,000 for one of her father's rights for dramatico musical purposes. That music for that purpose was sold and concluded. ASCAP admittedly has no interest directly or indirectly in that transaction. The Nebraska Act conforms to that right and does not interfere with such transactions.

3. The Copyright Act specifically provides that there shall be collected upon all mechanical reproductions 2¢ per [fol. 182] each part (17 U. S. C. A., page 5), and which must be collected by the manufacturer when he sells the mechanical parts, rolls, discs, etc., including coin operated machines. The composer receives that sum direct from the manufacturer. ASCAP admittedly has no interest in such transactions. It is one of the separate rights that the composer and his publisher have, and which they handle independently of ASCAP and independently of all else, and all other publishers and composers. Consequently, there is no conflict with that provision of the National Act and the Nebraska Act, as the matter of price at 2¢ per roll must be collected and fixed by the composer by the National law.

4. With electrical transcriptions and other mechanical devices, ASCAP is not interested. The National Act provides that others who use the same must pay that price so fixed, and each must pay it. There is no interference by the Nebraska Act in reference to mechanical reproductions,

including electrical or otherwise. That, too, is a matter for accounting between the composer and his publisher, and the manufacturer. The Nebraska Act in no way interferes with that right because the same agreement for price that might be made with a manufacturer in New York could likewise be made with a manufacturer (if there were one) in the State of Nebraska, and the price for such manufacturing right to all mechanical devices is thus fixed and determined. Nothing in the Nebraska Act conflicts with this provision of the National Copyright Act.

5. As far as the sale of sheet music is concerned, that is admittedly an item upon which the evidence clearly shows that ASCAP is in no way interested. That is a matter purely between the composer and his publisher, and the evidence shows (See each deposition of composer and publisher on file) that they collect three cents per piece when the sheet music is sold at the music stores, and that three cents is remitted as a part of the purchase price, and the publisher gives one-half or all of it to the composer as his royalty on each piece of sheet music that is sold, as they might agree. In most instances, however, the evidence [fol. 183] clearly shows that the publisher is the owner of the copyright and thus that three cents for each copy of sheet music is collected for the publisher. That is immaterial to this case, ASCAP not being interested therein, and that transaction is in no way interfered with by the Nebraska Act.

6. It then becomes only a question of what is known as the "small public performance rights". That is what ASCAP owns; that is what ASCAP completely controls and dominates free from interference by the composer or publisher under the terms of the contracts in evidence. Consequently the Court erred in its opinion of 12/28/39, and the same in its Findings of Fact of 1/25/40, when the Court erroneously found that Section 2 (B) or 2 (A) interfered with these respective rights. It does not. In fact, the enactment of Section 2 was evidently for the purpose of protecting the individual composer and his publisher in the State of Nebraska after ASCAP was dissolved by permitting or requiring the composers to handle their own small public performance rights in Nebraska by selling the same if they wished. The stamping on the music sold in Nebraska could read specifically to include or exclude any

one or all of the rights above granted—and so far as public performance rights are concerned, why is it not a reasonable regulation and a good one to require the composer to make known the price for his public performance rights and collected at the source? Wherein does the Copyright Act restrict state legislation on that score? That merely requires the composer to make his wants known. Repeated public performance—is that the objection? How is it handled now? Outside the scope of the National Copyright Law is the method now used by ASCAP in collecting for public performance rights. The National Act gives no such right as ASCAP is exercising, in the State of Nebraska, in the matter of its monopolistic practices in restraint of trade. Nor, does the National Copyright Act, by its terms, provide for any such means or methods of arriving at fees and licenses, and the distribution thereof, as ASCAP has invented.

[fol. 184] 7. The Copyright Act does not define the means and the methods of the collection of what is known as the small public performance rights that have been given to ASCAP and which amount in the nation to some \$6,000,000 per year, and in the State of Nebraska to \$70,000 per year or more.

8. The Nebraska Act, Section 2 (A), does not require those public performance rights to be given or granted when the sheet music is sold. The publisher may stamp thereon, if he desires to do so, all limitations of and the prices for public performance.

9. ASCAP only being interested in the small public performance rights, the material feature is whether or not there is interference with the Copyright Act in requiring the composer and his publisher, when they sell music in the State of Nebraska, to sell the small public performance rights with it, if they wish—and if they wish—then and only then to state the terms on the music, and what parts are granted and what parts withheld and what uses are granted by the sale. Defendants admit that interpretation of Section 2. For example, in the deposition of Ella Herbert Bartlett, she stated that in 1937, her publisher sold 300,000 copies of her father's copyrighted music; she received three cents a copy directly from her publisher for the ordinary sheet music royalty, which she and her publisher fixed and

determined ahead of time. The Nebraska Act would not stop that. She received \$50,000 for one piece for the dramatico-musical rights, and she received large sums of money on the basis of 2¢ per roll for mechanical reproductions. The Nebraska Act would not stop that. This she collected at 2¢ per part from the manufacturer through her publisher acting as her agent or under contract with her. Therefore, on some of the sheet music that she sold—if she stamped public performance rights, defining its limitations, if she collected one dollar per copy for public performance rights copies so sold for that purpose, on 10,000 of the 300,000 sold, she would have received \$10,000 directly [fol. 185] from the music houses for small public performance rights. There is nothing in the Nebraska Act (Section 2 A) to prevent her from estimating what her public performance rights were worth for these small public performance rights for the music that was sold for public performance purposes within the State of Nebraska. She received from ASCAP in 1937 \$7500 for those rights. If she wished to charge \$5.00, or \$10.00, or \$1.00 per copy for those sold in Nebraska for that purpose, she could so do; or, she could withhold that right completely and sell only the sheet music that would carry with it, as now, no public performance rights. This is not an interference with the Copyright Act, but is a legitimate exercise of the rights of the State to remedy a situation which Congress has not remedied in the Copyright Act, and which is not within the exclusive purview of the Copyright Act. It gives the right, but not how it shall be performed. If the right is in no way curtailed, the method of collection is not violative of the provision of the National Copyright Law.

10. The cases cited on Pages 36 and 37 of the defendants' proposed Conclusions of Law, filed on 10/4/39, are respectfully referred to because in some of those cases the Supreme Court of the United States has held, as shown in those cases, that it was not the intention of Congress to curtail states in a matter similar to Section 2 (A).

X

In reference to additional testimony under Rule 59 and 52, to bring out all phases of the various public performance rights, defendants move the Court:

1. To grant a partial retrial by receiving additional evidence in the form of either affidavits, or depositions, or the answering of interrogatories by the plaintiffs to establish exactly in what manner the respective parts of public performance rights of the National Copyright Act are dealt in by composers and publishers, because the Court in its opinion of 12/28/39 and in its finding of 1/25/40, er-[fol. 186] roneously defines those rights, and then finds an interference therewith as the dominating issue in the case, and thereby defeats the whole Act. One or two short depositions, or the answering of a short set of interrogatories, in addition to the evidence of record, should rectify the erroneous findings of the Court.

2. The reference to public performance rights in the last half of Page 6 and all of Pages 7 and 8 of the opinion of 12/28/39, and Paragraphs 16 and 19 on Pages 6 and 7 of the Findings of Fact of 1/25/40, are the objectionable findings and are erroneous, and should be stricken or clarified to speak the truth by some new evidence.

3. It was the duty of the plaintiffs to have given the Court complete and adequate evidence on all phases of public performance rights; they have not done so, and yet the Court has held, without adequate evidence to support its findings, upon the request of ASCAP a quite complete resume of public performance definitions and how applicable. These findings, defendants claim, are in error. In justice to the defendants, the same should be corrected, and amended findings, conclusions, and decree granted, upon new evidence, or the same entirely stricken from the consideration of the case. As it now stands, it is the controlling finding.

XI

The attitude taken by the defendants is that Section 2 (B) and Section 2 (D) as well as Section 2 (A), might readily be blue-penciled from the Act and held non-enforceable without in any way curtailing or hampering the other main features of the Act in reference to monopoly.

1. The defendants state that in connection with Section 2 (A), while they believe the same to be a proper exercise of the legislative function of Nebraska and believe in its constitutionality, and that it is not a violation of the National Copyright Act, still if the Court should hold, as to

Section 2 (A) that it is unconstitutional, the whole Act should not fail. That is manifestly unjust to defendants. [fol. 187] All of Section 2 is easily separable. The main monopolistic features of the Act will stand after the separation.

XII

Elimination of the finding that the Nebraska Act is drastic in its provisions.

In the Findings of Fact and Conclusions of Law of 1/25/40, it has been stated that the Act is too drastic in its penalties. We respectfully urge the Court to read the cases from Nebraska on Pages 33 and 34 of defendants' proposals of 10/4/39, and the other penalties provided for monopolistic practices in other lines in the State of Nebraska, as well as the Sherman Act, and it will be readily seen that the penalties are not any more severe than in other similar acts held valid. A Finding of Fact on that matter should be entered, or the "drastic" reference in the Findings (Par. 12, Page 7, Findings of 1/25/40) should be stricken.

XIII

In reference to the separability of Section 2 from the balance of the Act.

1. A careful reading of the Nebraska cases cited in the opinion of 12/28/39, in reference to the inseparability of parts of an act, will convince the Court that those cases are in themselves adequate authority to sustain the defendants' contention herein that Sections 2 (A), 2 (B), and 2 (D) of L.B. 478 might readily be stricken and still the Act be enforceable and proper in all its other phases.

2. The objectionable parts of the Nebraska Act, being Section 2, pertain to the individual composer and his publisher. Section 1 and all the balance of the Act, except said Section 2, pertains to the unlawful combination. If Section 1 and its enforcing provisions are held constitutional, and Section 2 (A), 2 (B) and 2 (D) are held unconstitutional, we respectfully submit that the main and important feature of the Nebraska Act will be left entirely intact and enforceable. A reading of the Act, with Section 2 eliminated, should convince the Court. Certainly there was [fol. 188] no ulterior motive of the Nebraska Legislature in its attempt to give the individual composer and his pub-

lisher the right to collect themselves for public performance rights if they wished. If the Legislature in so doing overstepped its limitation in the Sections 2 (B) and 2 (D), those two might be stricken, and Section 2 (A) would be perhaps more clear. This is what defendants wish the Court to reconsider. But, even if all of Section 2, including 2 (A), is classified as non-enforceable with 2 (B) and 2 (D), defendants submit that the Act, L.B. 478, shorn of all those parts, or some of them, must stand as a proper exercise of the state legislative power to prohibit unlawful combinations from carrying on their business in Nebraska.

Respectfully submitted, William J. Hotz, of Omaha, Nebraska; John Riddell, Assistant to Attorney General Walter R. Johnson of the State of Nebraska, Lincoln, Nebraska; Andrew Bennett, for Defendant Groshaus, of Washington, D. C.; and Gordon Diesing, of Omaha, Nebraska, Assisting William J. Hotz on Brief, Attorneys for Defendants. (S.) William J. Hotz, 1530-5 City National Bank Building, Omaha, Nebraska, for Defendants.

February 5, 1940.

[fol. 189] IN UNITED STATES DISTRICT COURT

[Title omitted]

Equity No. 562

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR NEW TRIAL

STATE OF NEBRASKA,
County of Douglas, ss:

Amos Thomas, being first duly sworn upon oath, deposes and says that he was a member of the Nebraska Legislature on May 13, 1937, and was present and voted for the final passage of L. B. 478; that the title to said bill shows that the main features of the same were an act relating to unlawful monopolies in copyrighted vocal or instrumental musical compositions and prohibiting combinations composed of copyright owners, their heirs, successors, or assigns; that said bill had been debated on the floor repeatedly previous to its passage and was reported

out by the Judiciary Committee; that the Nebraska Legislature at said time was a Unicameral Legislature consisting of 43 members; that the roll call of record on final passage showed 32 votes for the bill, 7 against the bill, and 4 not voting.

Affiant further states that he is familiar with Section 2-B, relating to the rights given to users in the event the individual composer refused to fix upon the music the selling price for public performance and other uses; and also is familiar with Section 2-D, which required the filing of the copies of the musical composition with the Secretary of State at 25¢ per copy; and is also familiar with Section 2-A that required the individual composer to fix the selling price for public performance rights and stamp it upon the musical composition if the composer or publisher desired to grant or sell his public performance rights.

[Penciled in margin:] 20-A

Affiant further states that none of said parts of Section 2 were the inducing causes for the passage of the bill, nor for the affirmative vote of this affiant; that there was incorporated in the said act the saving clause, known as Section 12, in reference to the enforcement of the balance of the act in the event any part was held non-enforceable; and furthermore, the act specifically provided that all benefits of the national copyright law would be granted to all authors and composers, and their heirs and assigns, within the State of Nebraska.

Affiant further states that the inducing cause, and the legislative intent, and this affiant's affirmative vote, in passing L. B. 478, were fundamentally and mainly to prohibit the operation of an unlawful combination of copyright owners acting in restraint of trade and in the fixing of prices within the State of Nebraska; and that Sections 2-B and 2-D, as well as Section 2-A, were not the main or the inducing reasons for the passage of the bill, nor for this affiant's affirmative vote, but said sections were merely incidental to the main issue in reference to monopoly, and separable therefrom.

Amos Thomas.

Subscribed in my presence and sworn to before me this 30th day of January, 1940. Harold A. Moore, Notary Public. (Seal.) My commission expires January 28, 1943.

(Copy). Ex. 19. Exh. 1 to 22 exact copies hereof.

[fol. 190]

CERTIFICATE

I, GRACE A. BOWEN, a notary public, do hereby certify that the following named persons, in the following named counties, and on the following named dates, and before the following named notaries public, signed and acknowledged affidavits in the exact wording of the affidavit of Amos Thomas attached hereto; and that all the said original affidavits, being 22 in number, were filed with the Clerk of the United States District Court at Lincoln, Nebraska, in said cause, Equity No. 562, and attached to the Motion for New Trial; that said affidavits were drawn, and copies thereof made, by the undersigned.

(SEAL)

(S) Grace A. Bowen
Notary Public

Dated: February 3, 1940

Name	Date Signed and Acknowledged	County	Notary
Armstrong, Robert M. Exh. 1.....	1/30/40	Nemaha, Nebr.	Oscar A. Flau
Ashmore, Hugh B. Exh. 2.....	1/30/40	Hitchcock, Nebr.	J. E. Blum
Brady, Frank J. Exh. 3.....	1/29/40	Holt, Nebr.	J. B. Nickerson
Brodecky, Emil E. Exh. 4.....	1/31/40	Colfax, Nebr.	James A. Fiala
Cady, P. L. Exh. 5.....	1/31/40	Washington, Nebr.	Tom Dowell
Carlson, Swan Exh. 6.....	1/30/40	Phelps, Nebr.	J. M. Larson
Frost, Tracy T. Exh. 7.....	1/30/40	Howard, Nebr.	Pearl Dobry
Howard, R. M. Exh. 8.....	1/31/40	McPherson, Nebr.	Clay Wright
Knickrehm, John Exh. 9.....	1/30/40	Douglas, Nebr.	Grace A. Bowen
Murphy, L. B. Exh. 10.....	1/30/40	Scottsbluff, Nebr.	Maude Glover
Neubauer, E. M. Exh. 11.....	1/31/40	Orleans, Nebr.	Geo. S. Austin
Norton, J. N. Exh. 12.....	1/31/40	Washington, D. C.	Helen A. Bonorder
Peterson, Carl H. Exh. 13.....	1/29/40	Madison, Nebr.	Kathleen Kulp
Peterson, John B. Exh. 14.....	1/30/40	Saunders, Nebr.	C. N. Walton
Regan, R. C. Exh. 15.....	1/30/40	Platte, Nebr.	Carl N. Hoge
Reynolds, John D. Exh. 16.....	1/30/40	Knox, Nebr.	E. A. Houston
Schultz, Edwin Exh. 17.....	1/31/40	Antelope, Nebr.	Rosa Martin
Slepicka, Alois Exh. 18.....	2/ 1/40	Saline, Nebr.	J. J. Grimm
Thomas, Amos Exh. 19.....	1/30/40	Douglas, Nebr.	Harold A. Moore
Tvrdek, Charles F. Exh. 20.....	1/31/40	Douglas, Nebr.	Otto Smolek
—on Seggern, E. M. Exh. 21.....	1/31/40	Douglas, Nebr.	Grace A. Bowen
Wells, Franklin S. Exh. 22.....	1/31/40	Jefferson, Nebr.	E. R. Bee

[fol. 191] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION FOR NEW TRIAL—Filed March 28, 1940

The Defendants' Motion for a New Trial, and for other relief, filed on February 5, 1940, in the above entitled case,

which has heretofore been submitted to the Court, consisting of Archibald K. Gardner, Circuit Judge, Thomas C. Munger, District Judge, and J. A. Donohoe, District Judge, is hereby overruled.

(S.) Archibald K. Gardner, United States Circuit Judge; Thomas C. Munger, United States District Judge; J. A. Donohoe, United States District Judge.

[fol. 192] **ACKNOWLEDGMENT OF SERVICE**

The undersigned, one of the attorneys for the plaintiffs in the above entitled cause, hereby acknowledges receipt of copy of the Defendants' Motion for New Trial and the Affidavits Attached, the same being served upon the undersigned this 5th day of February, 1940.

Dated at Omaha, Nebraska, this 5th day of February, 1940.

L. J. TePoel, One of the Attorneys of Record for the Plaintiffs.

[File endorsement omitted.]

[fol. 193] **IN UNITED STATES DISTRICT COURT**

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 27, 1940

To the Honorable Clerk of the United States District Court,
District of Nebraska, Lincoln Division:

In the above entitled cause, an appeal is to be taken to the Supreme Court of the United States; all of the plaintiffs or complainants above mentioned on this appeal shall be designated as appellees, and all the defendants as appellants, as shown by your records and files, in the caption of said cause.

Heretofore and on June 27, 1940, there has been filed in your office all the appeal papers required by Rules 7, 9, 10, 11, 12, and 13 of the Supreme Court of the United States and Rules 72 and 75 of the Code of Civil Procedure. These papers together with all pleadings and decisions of the United States District Court in said cause, together with appellees' motion to dismiss or affirm, and the appellants' answer and brief in support, together with this præcipe and proof of service hereof upon the appellees, together with

your certificate of authentication, shall be incorporated by you and shall constitute Volume I of the Transcript of Record on Appeal.

For the purpose of aiding and assisting you in compiling this record, we file this day Transcript of Record, Volume I, containing the aforementioned papers, and as more particularly set forth in the index to said Volume I, which is [fol. 194] submitted to you herewith, and an exact copy of which has this day been duly served upon the appellees.

As a further aid and assistance to you in preparing the necessary record on appeal, we have prepared under the aforementioned rules of the Supreme Court of the United States and of the Code of Civil Procedure a condensed statement of the evidence of the witnesses given at the trial, in the depositions, and in the interrogatories. This condensed statement has been made up from the certified copy of the stenographic reports of said testimony on file in your office and an extra copy of said stenographic notes of the evidence taken at said trial, duly certified by the reporter, has been likewise lodged with you. Therefore, we request that you certify the said Volume II, being the said condensed statement of the evidence of all the witnesses given at the trial, in the depositions, and in the interrogatories as the designation of the record of said evidence prepared and filed with you by the appellants, and an exact copy thereof has been served upon the appellees as shown by the proof of the return of the service filed herewith.

Also to aid and assist you in preparing the record on appeal, we are herewith tendering for filing in your office Volume III, which is a transcript of record of all the exhibits offered by all parties to the case at the trial, in the depositions, and in the interrogatories; that these exhibits have been condensed and duplications eliminated, and unnecessary parts thereof omitted; that the exhibits in said Volume III are more particularly set forth in the index attached to said Volume III; that an exact copy of the transcript of evidence of said exhibits has been duly served upon the appellees as shown by the return and proof thereof, which is submitted to you for filing herewith and shall be incorporation by you as a part of Volume I. You are requested to certify the said Volume III, being the said condensed record of the exhibits offered by all parties to the case at the trial, in the depositions, and in the interrogatories as the designation of the record of said exhibits

served upon the appellees and filed with you for the purpose of completing the transcript of the record on appeal.

[fol. 195] That a copy of this praecipe together with an exact copy of Volumes I, II, and III of the above designated record on appeal, have this day, July 27th, 1940, been duly served upon the appellees and proof and return thereof duly submitted herewith.

You are requested to forward said Volumes I, II, and III so certified by you and as this day filed with you, together with the proof of service upon the appellees, to the Clerk of the Supreme Court of the United States so that the same shall be on file in said office in Washington, D. C. on or before forty (40) days from and after the 27th day of June, 1940.

Dated at Omaha, Nebraska, this 27th day of July, 1940.

William J. Hotz, Special Assistant to the Attorney General, 1530-5 City National Bank Bldg., Omaha, Nebraska; Walter R. Johnson, Attorney General of the State of Nebraska, Lincoln, Nebraska; John Riddell, Assistant to the Attorney General of the State of Nebraska, York, Nebraska, Attorneys for Appellants.

Served on appellees and filed with Clerk U. S. D. C., July 27, 1940.

[fol. 196] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF SERVICE OF THE TRANSCRIPT OF RECORD AND DESIGNATION OF RECORD ON APPEAL AND PRAECIPE—Filed July 27, 1940

UNITED STATES OF AMERICA,
State of Nebraska,
County of Douglas, ss:

William J. Hotz, being first duly sworn upon oath, deposes and says that he is one of the attorneys appearing for the appellants in the above entitled matter and duly authorized to make service herein under order of Court; that on Saturday, the 27th day of July, 1940, at five o'clock P. M., he served the praecipe for appeal and designation of record, to which this affidavit is attached, upon Mr. L. J. TePoel, one of the attorneys of record for the appellees, by deposit-

ing a copy of this praecipe together with the transcript of the record, Volume I containing all the pleadings and decision of the lower court, all the appeal papers required in accordance with Rules 7, 9, 10, 11, 12, and 13 of the Supreme Court of the United States and Rules 74 and 75 of the Code of Civil Procedure, and the appellees' motion to dismiss or affirm and the appellants' answer and brief in support, as set forth in the index to said Volume I and attached thereto; Volume II being a transcript of the record and condensed statement of the evidence of the witnesses given at the trial, in the depositions, and in the interrogatories, together with the index attached thereto, the same being the appellants' [fol. 197] designation of the condensed record of the evidence for the appeal.

Also there was served upon the attorney for the appellees at said time Volume III Transcript of the Record of the exhibits introduced at the trial of said cause, at the taking of the depositions, and in the interrogatories; that said exhibits have been classified and condensed, duplications eliminated, and the unnecessary parts omitted, and said exhibits indexed as shown in said Volume III, and an exact copy of which was so duly served upon the attorney for the appellees.

That the service of said foregoing papers and documents upon the said L. J. TePoel, attorney of record for the appellees, was so made by this affiant personally depositing the same at the office of the said L. J. TePoel, 605 Farnam Building, in the City of Omaha, Nebraska, which is the office of the said L. J. TePoel; that prior to so depositing the above mentioned papers on the desk of the said L. J. TePoel at said time and place, this affiant notified personally the said TePoel at 3:30 P. M. of said day that he would make delivery of said papers at the office of the said TePoel at 5:00 P. M. on July 27, 1940; that at said time, the said TePoel was absent from his office; that there was no clerk or other person in charge, and therefore in accordance with Rule 5, Sub-division B of the Code of Civil Procedure the same was so left in a conspicuous place in said office, to-wit: Upon the desk of the said L. J. TePoel.

William J. Hotz. (Seal.)

Subscribed in my presence and sworn to before me this 27th day of July, 1940. Grace A. Bowen, Notary Public. My commission expires: September 3, 1943.

[fols. 198-200] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 201-206] IN UNITED STATES DISTRICT COURT, DISTRICT
OF NEBRASKA, LINCOLN DIVISION

562—Equity

GENE BUCK, INDIVIDUALLY, and as President of the American
Society of Composers, Authors and Publishers, et al.,
Complainants,

vs.

HARRY R. SWANSON, as Secretary of State of Nebraska, et
al., Defendants

Statement of Evidence

APPEARANCES:

Mr. Louis D. Frohlich, of the firm of Schwartz & Frohlich,
New York, New York;

Mr. Herman Finkelstein of New York, New York; and
Mr. L. J. TePoel of Omaha, Nebraska,—For Complain-
ants.

Mr. William J. Hotz, of Omaha, Nebraska;

Mr. John Riddell, Assistant Attorney General of the
State of Nebraska, Lincoln, Nebraska; and

Mr. Andrew Bennett, of Washington, D. C.—For De-
fendants.

[fol. 207] Be It Remembered, that commencing on the 18th
day of September, 1939, at ten o'clock A. M., the above en-
titled cause was tried before the Court, the Honorable A. K.
Gardner, Honorable James A. Donohoe, and Honorable
T. C. Munger, Judges Presiding; that on the trial of said
cause, the complainants and defendants, to maintain the
issues joined on their respective parts, introduced and
offered before the said Court the following oral and docu-
mentary evidence and interposed the objections and took
the exceptions herewith noted:

[fol. 208] STIPULATION RE AMOUNT INVOLVED

Mr. Te Poel: May it be stipulated for the purpose of the
record that the jurisdictional amount is a matter of fact

that is involved in this case and is sufficient to sustain the jurisdiction.

Mr. Frohlich: We so approve.

The Court: In other words, it exceeds the amount of \$3000.00, plus interest and costs.

Mr. Hotz: The defendant, Richard Hunter, is no longer in the case and Walter R. Johnson is now substituted as a party defendant by agreement. It is stipulated and the order of the Court that Mr. Barlow Nye, Administrative Assistant to the Attorney General, is succeeded by Mr. John Riddell. The rest of the defendants remain the same. Mr. Andrew Bennett will appear as special counsel for Mr. Grosshaus, who is one of the county attorneys made party defendant.

Mr. Frohlich: May I ask the Court, please, who Mr. Hotz appears for?

Mr. Hotz: I appear for the defendant, Harry Swanson, and for the Attorney General's office.

MOTION TO STRIKE FROM ANSWER

Mr. Te Poel: The complainants move that Paragraph 15 of the Defendants' Answer be stricken for the reason that the allegations contained in said Paragraph 15 constitute no defense to any of the issues tendered in this case by plaintiffs' Bill of Complaint; and for the reason that said Paragraph 15, or the allegations in it contained, tender no issue properly triable in this case.

[fol. 209] GENE BUCK, called as a witness on behalf of the complainants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. What is your full name?

A. Gene Buck.

Q. Where do you reside?

A. Great Neck, New York.

Q. Are you a citizen and resident of the State of New York?

A. Yes, sir.

Q. How long have you lived in that state?

A. Thirty-three years.

Q. Where did you originally come from?

A. From Detroit, Michigan.

Q. How old were you when you came to New York?

A. Twenty-one.

Q. And what profession or business did you pursue?

A. I was originally an artist for three years, and then started to write songs.

Q. The words or the music?

A. Mostly the lyrics—the words, and also some music; and from that, the writing of songs, which I am primarily interested in, into the writing of musical plays and the [fol. 210] production of musical plays.

Q. Were your musical compositions published from time to time?

A. Over five hundred of them.

Q. I hand you this list of musical compositions, Mr. Buck, and ask you whether this list accurately and truly represents musical compositions composed and published by you?

A. Yes, those are the numbers. I wrote forty productions for the late Florenz Ziegfeld and his Follies.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 1.

Q. You say you were associated with the late Florenz Ziegfeld for many years?

A. Yes, sir.

Q. Did he produce plays known as the Ziegfeld Follies?

A. Yes, sir.

Q. Were they highly successful plays?

A. I believe the most successful reviews ever produced in America.

Q. Did you have anything to do with the writing of any part of those plays?

A. Yes.

Q. For how many years were you connected with him?

A. Twenty-three years.

Q. Did you become a member of the American Society of Composers, Authors and Publishers at one time?

A. I was one of its original founding members in 1914.

[fol. 211] Q. Can you give us the names of the other gentlemen who helped found that organization?

A. The real founder, the instigator of this society, was the late Victor Herbert, who called us together. It also consisted of Louis Hirsch, composer, Raymond Hubbel, Glenn McDonough, Silvio Hein, and Henry Blossom. This was part of a small group of composers and authors.

Q. Are you familiar with the conferences and talks between these various persons you have just named with reference to the incorporation or organization of the Society?

A. I was with them when it was brought into being.

Q. Do you know what brought about the organization of the Society?

A. Yes, sir.

Q. Will you please tell us briefly?

A. There was in this country at this time authors and composers who were confronted with a situation that had never happened before. That is, large companies, corporations and users of music were taking their works without asking the men who created it or their publishers, and started to build industries in this country on the productions of their brains. At first it started with the phonograph companies, who without paying George M. Cohan or Victor Herbert or Phillip Sousa or the man who created the songs in this country, a nickel, took their works and put them on phonograph records and built one of the great [fol. 212] businesses of the world, and up to that time the man who created that song—the words and music—and his publisher never received a nickel in royalty. In 1909 Mr. Nathan Burkan, since dead, the attorney for Victor Herbert, marched to Washington and said that something should be done about this situation. Theodore Roosevelt was President of the United States at that time, and he also had a gift for writing. When this situation was brought before him he said that the law should be changed and that the composers and authors should receive some recognition for their compositions and writings being violated. These records were made and sent all over the world and this terrific injustice existed. He made a recommendation to Congress, and the Act of 1909, or revision of the Copyright Act, was put into the Copyright Act. It was the first fundamental protection, which is going to flow through this case; this recognition of the rights of creative workers. I merely highlight this so that you get some of the atmosphere that's in this case, which is good

for the record and good for your minds in addressing yourself to it.

The author and composer prior to 1909, such as Cohan, Sousa or Herbert, contributors of musical works in this country, never received a cent from the phonograph companies, and they were springing up throughout this nation, taking their works, engaging orchestras and stars, and putting them on wax, and sending them throughout the world. The phonograph companies were very powerful in Wash-[fol. 213] ington, to such an extent that there came into this fight Charles K. Harris, who, I believe, wrote "After the Ball", since gone; Harry Von Tilzer, and also into the fight came Augustus Thomas, Robert Underwood Johnson, all creators banded together, men who had a gift for writing songs, a book or play or novel or article. What was involved in this question? It was the first intrusion of the mechanization into taking and holding creative works without asking the man who created it if they could go ahead and use it, and they built up gigantic interests. There were a handful of writers, and the opponents were very, very powerful. Out of it came one of the most insidious things in American law—the price fixing provision which was set out in the Act of 1909—a provision that the author and composer and his publisher by law could only get two cents for the creation of his brain on a phonograph record, but a phonograph company could pay Enrico Caruso \$150,000 a year, and the leading bands and orchestras of the United States had a free right to bargain. The phonograph companies put it in there that two cents was all an author and composer and his publisher could derive from the sale of the record. At that time, and it is very important here, the phonograph record was confined to the home. This magic instrumentality called radio was not conceived at that time, and in the deliberations of Congress, inasmuch as this was a record, that phonograph record at that time was part of an instrument to mechanically reproduce. No per-[fol. 214] son living could read a phonograph record. These indentions would only speak when a needle was put on, and it was part of a machine. That was the start of the mechanization and of the utilizing of the works of creators of songs. Naturally those who wrote the songs of the country felt terribly. They were perfectly willing in those days, and they were the first to step forward to take this two cents, and that was the only compulsory license provision, I be-

lieve, up until a year or so ago, when it was put into some agricultural act. It was the first time in the history of this nation that price fixing was recognized in any part of our government, and it was an amazing commentary that it should be tacked on men and women who created the songs of the country.

Q. What happened, Mr. Buck, in 1914?

A. And from 1909 on—

Mr. Hotz: Go ahead with what you were saying.

A. In 1912 there started in this country the so-called cabaret. In 1913 it increased in volume and it broke out like a prairie fire throughout this country. You would go into a restaurant to eat and out in front of you would step a girl or a man or a quartet or a band in competition to the legitimate shows and enterprises in theatres built for such a purpose. Into this restaurant to lure patrons would come artists singing songs, and they would take the songs of mine from the Ziegfeld Follies, take the Victor [fol. 215] Herbert songs out of his repertoire, take the popular songs created by Irving Berlin and George Cohan, take Sousa's marches without ever asking anyone, just like the phonograph boys did. This new enterprise started in the restaurant business to lure customers into their establishments. There wasn't an author or composer in the United States, and the same condition exists today, who could engage an attorney, nor did he have the funds.

Q. Did you have a fund and were you able to do anything about it in 1914?

A. I could do nothing. I am going to answer the question you asked me. Victor Herbert had a sensational success on Broadway. This great, open-hearted, generous man called us together and said something should be done about this. They are taking the greatest songs of the country now, and it was a very insidious technique. They didn't charge admission at the door, but this was their creation, and one of the toughest things in this country, the so-called covert charge. Performers appeared on the floor and sang songs that they had pirated and which were created for musical play, and some of them cost \$200,000.

Mr. Hotz: We desire to object to the immateriality of the statements that have been made by the witness, and make this objection in this form, and request counsel to kindly

put your questions to the witness and let him answer them [fol. 216] as nearly as he can by questions and answers. We feel that much that has been said is immaterial, and that we could go on here and show the trials and tribulations many, many years ago, without getting down to what we are confronted with today.

Mr. Frohlich: I have tried to save time by not asking a lot of questions.

The Court: I think the witness is inclined to indulge in argument. Confine yourselves to the facts.

Q. Well, now, with reference to the American Society of Composers, Authors and Publishers, that was formed, you say in 1914?

A. I was just reaching that point.

Q. That was an unincorporated society under the laws of the State of New York?

A. I think the Court is entitled to know why it came into existence.

Mr. Frohlich: We will get to that in a minute.

I offer in evidence plaintiffs' Exhibit Number 2, Chapter 609 of the General Associations Law of the State of New York.

Mr. Hotz: No objection.

Q. Mr. Buck, I show you this document and ask you what it is?

A. That is Articles of Association of the American Society of Composers, Authors and Publishers.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 3.

Mr. Hotz: No objection.

Q. I show you two documents, Mr. Buck, and ask you what these represent?

A. They represent the membership list of the American Society of Composers, Authors and Publishers, affiliated societies, and the Board of Directors and Officers and all representatives in the States of the Union.

Q. Is this a blue document?

A. The blue one is for the year 1937, and the last issue is 1939, August 1st. That is most pertinent in this case.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibits Numbers 4 and 5.

Q. Mr. Buck, prior to 1914 did any of the users of American music, to your knowledge, pay any author or composer for the public performance for profit with respect to those compositions?

A. No, sir.

Q. And was that one of the motivating reasons for organizing the American Society of Composers, Authors and Publishers?

A. Yes, sir.

Q. After the organization of that Society in 1914 was the Society able to get money from the users for the public performance for profit of these compositions?

[fol. 218] A. The history is we didn't get the person in court. When we went in with the violation we met the restaurant owners of the United States.

Q. Were the restaurant owners organized into a trade association?

A. They were.

Q. What was the name of it?

A. I think it was—I would have to get a book; I can't recall. The record is there. The court records show it, with the opponents that confronted us.

Q. In other words, you say a test suit was brought of some kind?

A. Yes, sir.

Q. Were the restaurant owners represented by one counsel?

A. Yes.

Q. And who represented the group?

A. Yes.

Q. Was this case carried to the United States Supreme Court?

A. We lost the case in the lower court and it took three years and eventually it went to the United States Supreme Court, and the late Justice Oliver Wendell Holmes rendered a decision construing the Shanley case. That was the performance for purposes of profit, although there was an admission charge at the door by the indirect charge of the covert charge, and they put this charge on your check.

Q. That was the case of Herbert against Shanley?

A. Yes.

Q. After that decision came down in 1917 did you meet [fol. 219] any other further opposition on the part of the users with respect to payment for these performing rights?

A. In the interim during these three years the picture houses throughout the United States utilized the same way of taking the music works of authors.

Q. Were these picture houses organizing trade associations?

A. They were.

Q. Do you recall the names of some of the associations?

A. The Motion Picture Exhibitors of America and the Motion Picture Exhibitors of New York—they were organized in every state, and now they have a national organization and a state organization.

Q. A national and a state organization?

A. Yes, sir. Whom were we confronted with? We never met Mr. Shanley and never met the individual infringers. We were always confronted with an attorney like today, by the representatives of an association.

Mr. Riddell: Just a minute. I move to strike out the answer as not responsive to the question, and wholly argumentative.

The Court: Overruled. Part of the answer is clearly responsive.

Q. In the years 1917 on was the litigation between the American Society and users with respect to the attempt by the American Society to enforce the rights of its members?

A. It is continual right up to this moment; it never ceased.

[fol. 220] Q. Did the motion picture theatre owners pay anything to the American Society for the use of the compositions in the theatres?

A. Not until forced to by the court action.

Q. How long did that take?

A. That took two years, I think.

Q. Did the motion picture owners pay anything to any of the individual authors, composers and publishers, members of the Society, during that period?

A. Never in their history.

Q. Did they pay anything to any author for performing rights, do you know?

A. Never in their history.

Q. Well, did the time come when the American Society on behalf of its members, entered into license agreements with the owners of motion picture theatres in the United States?

A. Yes. When our rights were upheld by the court, then we negotiated with them.

Q. Now, in 1923 was radio the coming factor?

A. It started in 1921, yes.

Q. By 1923 had it reached any proportion?

A. Yes, very much of a proportion.

Q. There were a number of radio stations in existence in 1923?

A. Yes.

Q. Were these radio stations operating throughout the United States?

[fol. 221] A. They were.

Q. Were they utilizing musical compositions for the purpose of public performance at profit?

A. They were.

Q. Were they utilizing the compositions of the members of the American Society?

A. They were.

Q. Did they offer to pay to the American Society, or to any individual members of the Society, any compensation for the public performance for profit?

A. No, they did not. The picture owners resisted.

Q. Did the Society demand of them that they pay compensation for these performing rights?

A. They did.

Q. Was that demand acquiesced in?

A. No.

Q. Was there litigation on the subject?

A. The first case brought by the American Society of Composers, Authors and Publishers was in the State of New Jersey and tried before Federal Judge Lynch, who upheld the Society. That was constituted a public performance for profit. The broadcasters said, like everybody else, "We are not infringing here."

Mr. Riddell: I move to strike out that portion of the answer beginning, "The broadcasters, just like everybody [fol. 222] else", from there on, as not responsive.

The Court: It may be stricken out.

Q. Were the broadcasters organized in any groups in 1923 and subsequent years?

A. Yes.

Q. Can you give us the names of the groups?

A. The original association was the National Association of Broadcasters which is in existence today, and the first president was Gene McDonald of Chicago, and then there was Paul Klugh, executive chairman, who now works in Chicago. I happen to know the gentlemen met in Washington, where they went down to change the law, to have the two cents compulsory apply to broadcasters.

Mr. Hotz: Objected to as hearsay, and as not responsive. I suggest that counsel confine Mr. Buck to his specific questions.

The Court: The volunteer part may be stricken out. Overruled as to the rest.

Q. Now, Mr. Buck, you said there was litigation between the Society and the broadcasters after 1923?

A. That is right.

Q. Was the National Association of Broadcasters represented by its own counsel?

A. Yes.

Q. What form of opposition did the Broadcasters take with respect to the Society, in addition to litigating their [fol. 223] rights in others?

A. Well, some of them first didn't use the American Society works on their broadcasting stations, namely, the R. C. A., headed by Mr. David Sarnoff, for some time. He operated WJZ and some of his stations, without utilizing the works of the American Society.

Q. But now did a time come when the activities of the Broadcasters took other shape?

A. I didn't hear the last.

Q. Did the time come when the activities of the Broadcasters were extended and took other shape? Did they do anything else?

A. We took the Broadcasters to court and were upheld by the courts, and they did the next thing to change the law.

Q. You mean with respect to the copyright law?

A. To change the basic copyright law by a bill introduced by Senator Dill of Washington.

Q. What year was that?

A. In 1924.

Q. Were hearings held before committees in Washington?

A. Yes; numerous committees in the Senate and House, and one joint hearing.

Q. Did you attend those hearings?

A. I did.

Q. Who appeared in favor of the bill which would affect the copyright law?

[fol. 224] Mr. Hotz: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. The National Association of Broadcasters.

Q. Are you able to tell us without looking at any document, from your own memory, what particular bills were introduced and who appeared in favor of those bills against the interest of the American Society?

A. The first bill was the so-called Dill bill introduced by the Broadcasters in 1923. There was the introduction in Congress of a revision of the Copyright Act known as the Vestal bill, and there were long extensive hearings that lasted a year and a half. Vestal of Indiana happened to be chairman of the committee. The Broadcasters appeared then as the National Association of Broadcasters. And if it is so desired, I will put the counsels' names in the record.

Q. I want you to tell us. Are you able to do it from memory?

A. The next important bill that the users of music presented was the Duffy bill, introduced in the United States Senate by Senator Duffy of Wisconsin, for revision of the Copyright Act. It was known in Washington as the users bill.

Q. Mr. Buck, who prepared this document here, do you know?

A. This was prepared by our legal staff, and is a record from 1924 on of appearances at all hearings in Washington, on every bill pertaining to the change of the Copyright Act.

[fol. 225] Q. Will you refresh your memory from that document and tell us who appeared in 1924?

A. The first bill down there to change the Act from 1909 was brought down there by the original president, Gene McDonald of Chicago, and Paul Klugh, executive chairman. The bill was introduced by Senator Dill on the 9th day of April before the United States Committee on Patents, and

the appearance there was Mr. McDonald, Mr. Klugh and Mr. Charles Tuttle.

Q. He is a well known lawyer in New York City?

A. He is a very distinguished attorney, and at one time Federal District Attorney.

Q. Will you look at the other sections of this document, which refer to hotels and motion picture people with reference to these communication bills, and tell us who appeared on behalf of any other organization?

A. On the same Dill bill introduced, which would eliminate from the Act the all-important line, "public performance for profit", which the Society operates under for the protection of its members, Mr. Frank Boland for the Hotel Men's Association appeared at the same time.

Q. Did anyone else appear at that hearing?

A. At that hearing for the motion picture industry there appeared Mr. Sidney Cohen, who was at that time the head of the Motion Picture Theatre Owners Association, and Mr. Samuel Handy of the Motion Picture Exhibitors of [fol. 226] America, in the 68th Congress, in the first session.

Q. By the way, that bill didn't pass, did it?

A. It didn't; it was defeated.

Q. Did that bill affect the minimum damage clause of the act?

A. Yes; it attempted to strike it out.

Q. What was the clause?

A. Provision of \$250.00 as a damage clause which is in the act.

Q. After 1924 were any other bills introduced in Congress?

Mr. Hotz: Just a minute. We object to that as incompetent, irrelevant and immaterial. We have no objection to the present Copyright Act being referred to or introduced in evidence. I can't see the necessity nor the materiality for the various attempts they have made in Washington, D. C. to change the Copyright Act, and take it up year by year. It stands today on the statute books. The courts have universally held what the rights of the various authors and composers are under that act. There is no doubt about it, and there is no controversy here. This is not an infringement suit. There is nothing about infringement in this action. This is an action for a plain, ordinary, simple injunction to restrain the enforcement of a certain

bill for unlawful monopoly in the State of Nebraska. I [fol. 227] think, therefore, I will have to insist that they do not encumber the record, and permit this immaterial testimony to go in.

The Court: Overruled.

A. Yes.

Q. After 1924 were any other bills proposed to Congress which affected the Copyright Act?

A. Yes, sir.

Q. Will you be able to refresh your recollection, Mr. Buck, from looking at this document and tell us when the next bill was introduced?

A. The next important bill was introduced by Senator Duffy in the United States Senate. Numerous bills were dropped into the basket in 1924, but they didn't arrive at a crystallization to the extent that a committee gave a hearing to either side. The basket was filled with bills, but the patent committees of the House or Senate did not hold extensive hearings until the Duffy bill was introduced by Senator Duffy—the extensive hearings were held then.

Q. Did you attend the hearings?

A. Every one of them.

Q. Who appeared in favor of that Duffy bill?

A. The same gentlemen; the National Broadcasters, the Hotel Owners of America, and the Motion Picture Exhibitors of America.

Q. Did the Duffy bill affect the provisions of the Copyright Act with respect to minimum damage?

A. It did; it moved to strike out the \$250.00 clause, it moved to strike out the extension, more or less. An admission was charged at the door of a cabaret or restaurant. It was an entire user bill. I trust the Court will understand when I say "user", I mean our opponents again, who created it.

Q. Did the time come when legislation was introduced in the various states throughout the country which affected the rights of the composers, authors and publishers of musical compositions?

A. Yes, sir.

Q. Can you tell us the first bill that was proposed or passed with respect to such legislation?

A. The first bill introduced was in the State of Washington three years ago.

Q. Prior to the introduction of a bill which affected the copyright, did the State of Washington or the officials of that state take any action with respect to copyright owners who were members of the American Society of Composers, Authors and Publishers?

Mr. Hotz: Just a minute. Object to that as incompetent, irrelevant and immaterial, and not within the issues of this case. I am not prepared to go into what happened in Washington.

Mr. Frohlich: I have a decree of the State Court of [fol. 229] Washington, and the American Society was affected by this decree. I have a certified copy of it, by Judge Wright, in which he adjudicated the rights of the Society. Its nature and character had been attacked within that state.

I want to show by this witness what was the nature of this attack culminated in this decree. I want to show here that when this bill was passed, the bill now seeking to be enacted in the Statutes of the State of Nebraska, it wasn't the first bill of its kind and there was reason for having had that bill proposed in the State of Nebraska. There were some people who were interested in that bill. It was the culmination along the line of attack, first in the courts in the east and then in the halls of Congress, and when there was failure in the halls of Congress there was an attempt to introduce bills in the forty-eight States of the Union to emasculate the rights of these composers, authors and publishers, and this is one of the bills. I think the history of this bill or the reason for its passage is of some interest to the Court. The Court is not expected to sit in the dark and view things in a vacuum. They say this is affected with public interest, and I say it is a private interest of users. I think it is revealing, your Honors, on that point.

Mr. Hotz: If counsel has a decision of the court he wants to cite, it seems to me it is a matter for argument as to what other courts might have held under similar bills and similar circumstances. That isn't a matter for the witness to testify to. Of course, the American Society has had litigation. In fact, the name Gene Buck appeared before the court more than any other individual. They have got records here to show eighty-eight suits pending in Nebraska in the two jurisdictions we have here. I can't see the

materiality of that. I don't see why we have to go into the fights they had in Washington and Florida and Montana, and different things. Our Nebraska bill, we can show it is materially different.

The Court: Sustained for the present.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 6, being the decree of Judge Wright, a certified copy of it.

Mr. Hotz: We object to it as incompetent, irrelevant and immaterial, and not within the issues of this case. It merely purports, your Honors please, to be a decree in a case.

[fol. 231] The Court: Sustained.

Mr. Frohlich: I offer in evidence at this time, your Honors, two laws of the State of Montana, one passed in 1937 and one in 1939, very much similar to the statute in suit here. I merely want to offer certified copies of these laws in evidence.

Mr. Hotz: We object to those as incompetent, irrelevant and immaterial, having no bearing on the issues in this case, and encumbering this record. The laws of Montana are in their statute books.

The Court: This Court will take judicial notice of all these laws. Objection sustained.

Mr. Frohlich: They will be marked plaintiffs' Exhibits Numbers 7 and 8.

I also offer in evidence similar laws in the State of Washington, the State of Tennessee and the State of Florida, being Exhibits Numbers 9, 10, 11 and 12.

Mr. Hotz: Let the record show the same objection.

The Court: Objection sustained.

Q. Are you an officer of the American Society of Composers, Authors and Publishers?

A. I am the president.

[fol. 232] Q. And how long have you been president?

A. Sixteen years.

Q. I show you this document and ask you whether you recognize the signatures?

A. I do. That is a contract for agreement between myself and the American Society as a member.

Q. What is the date of that contract?

A. The date of that is June 25, 1935. That is a renewal agreement.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 14.

Mr. Hotz: No objection.

Mr. Frohlich: May I substitute a photostatic copy of that?

The Court: Yes, and the original may be withdrawn.

Q. Roughly, about how many publisher members are there in this Society?

A. About one hundred and twenty-three or one hundred and twenty-four.

Q. How many writer and composer members?

A. About one thousand and sixty or seventy.

Q. For each and every one of those publisher members, author and composer members, have executed similar contracts to Exhibit Number 14?

A. Exact contracts.

[fol. 233] Q. Now in force and effect?

A. The same contract between the publisher member and composer, and they all sign the same kind of a contract.

Q. When in point of time do they expire?

A. That contract expires December 31, 1940.

The Court: The other contracts also expire at the same time?

The Witness: They all do. They have been renewed for five-year periods all through the Society's history.

The Court: And the same period? They date from the same day and renewed at the same time?

The Witness: Yes.

The Court: Not each one has a five-year period, has it?

The Witness: All of them up to the year 1921. From 1914 we just had one contract. We had one contract at that time, and it had a continuity from 1914 to 1921. Then starting at the year 1921, from then on, it was for every five years. At the end of that five years all members in the Society signed a renewal agreement for a period of five years.

Q. Mr. Buck, has the American Society of Composers, Authors and Publishers any contractual relations with other societies elsewhere in other countries?

[fol. 234] A. It has some thirty-six nations.

Q. Among them is there one society in France?

A. The French Society and British perform the rights of the Society. Every country in Europe, with the exception of Russia.

Q. Now, I show you photostats of contracts between the American Society and European societies, and ask you whether these photostats are true and correct copies of the originals, and whether these contracts are presently in existence?

Mr. Frohlich: For the information of the Court, I have the originals in court, but I would like very much to take them back.

A. These are the photostat copies.

Q. Are the contracts all in force at this time?

A. Yes. I signed them.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 15 as a group and as one exhibit.

Mr. Hotz: You have them in once in your depositions.

Mr. Frohlich: I believe so, somewhere in the depositions.

Mr. Hotz: Let us not get them in here twice. We have no objection to them.

Q. Now, Mr. Buck, does the Society deal in any sheet music?

A. No, sir.

[fol. 235] Q. Does it have any interests whatever with reference to the publication of musical compositions?

A. No, sir.

Q. Does it purchase or sell any sheet music?

A. No, sir.

Q. Does it print or publish any musical composition?

A. No, sir.

Q. Does the Society own any copyright?

A. No, sir.

Q. Has it ever owned any?

A. Never in its history.

Q. Has it ever traded in any shape, manner or form in sheet music?

A. It has not.

Q. In what is the Society interested?

A. The author, composer and publisher vests in the Society the so-called "small performing right"—the right to publicly perform for profit.

Q. Is that the only right in which the Society is interested?

A. That is the only right they have.

The Court: Why have somebody testify about this if it is already in? It will probably speak more accurately than the witness' recollection.

Q. How does the Society license the compositions of its members to users of these compositions for the purpose of public performance for profit? Tell us the procedure.

[fol. 236] A. It issues a blanket license. If a theatre license, is predicated on the seating capacity of the house, it is so much per seat per year. The broadcasting station license is predicated, first, on the wave length of the station, the location of the station, the sum area of its listening public, and the power granted to them by the United States Government.

Q. As to a dance hall, what is done?

A. If a dance hall, it depends on its location and the size of it; if a restaurant, also its location and the size of it.

Q. Now, on September 1, 1937, did the Society have in force various contracts in the State of Nebraska with users of music in that state?

A. They did.

Q. I show you this group of contracts—photostats of these contracts, and ask you whether those are the contracts that were in force with the users of musical compositions in the State of Nebraska, May 17, 1937?

A. Without going into detail with every one of them, yes, they are the photostatic copies.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 16.

Mr. Hotz: While we have no objection as to the materiality and relevancy of this bunch of photostatic copies of the contracts in the State of Nebraska, it encumbers the record [fol. 237] unduly. They have set out in their complaint the users they have in their respective counties, and then attached to the bill of complaint a typical contract, and that so far as we are concerned, even though we have denied it, would be sufficient, except one contract we have called for, and that is with the radio station coupled up with the newspaper at Norfolk.

Mr. Frohlich: My reason for offering them is primarily that these contracts are very vitally affected by the statute. This statute abrogates each and every one of those contracts.

The Court: The question is whether they are already in the record.

Mr. Frohlich: They are not, your Honors. We simply attached one typical contract, a radio contract, a hotel contract. I think all the records ought to be in evidence.

Q. Mr. Buck, did you at my request have your office tabulate the revenue that was taken in by the American Society of Composers, Authors and Publishers from the users of music for the purpose of public performance for profit within the State of Nebraska from the year 1928 down to June 30, 1939?

A. I did.

Q. I show you this document and ask you whether that is the tabulation that was made?

[fol. 238] A. It is.

Q. Is that a true and correct tabulation from the books of the American Society?

A. It is.

Q. And accurately and truly represents the money that came in for the years indicated, in the manner indicated, is that right?

A. That is right.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 17.

Mr. Hotz: No objection.

Q. Did you also prepare at my request a schedule of the actual cost of operation and commissions paid by the Society within the State of Nebraska from the year 1932 to 1937?

A. I did.

Q. I show you this tabulation and ask you whether that is a true and correct tabulation taken from the books of the American Society?

A. Yes, sir, that is accurate.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 18.

Mr. Hotz: No objection.

Q. Mr. Buck, could you furnish the figures for 1938 and the first half of 1939?

A. I would be very glad to do it.

Mr. Frohlich: We will furnish it and bring it up to date.
[fol. 239] Mr. Hotz: Would you just as a matter of sim-

plification add that onto Exhibit Number 18? You could do it by pencil. And you will state, Mr. Frohlich, that will be the accurate records of your Society?

Mr. Frohlich: That is correct.

Q. Now, Mr. Buck, were you in 1914 able to protect your rights with respect to public performance for profit of your compositions throughout the United States?

A. No, sir.

Q. Were you financially in a position to hire investigators and lawyers to seek out infringement and so on?

A. No, sir.

Q. Have you ever been able yourself personally to protect yourself with respect to public performance for profit of your rights?

A. Not without an association.

Q. Does that same situation hold true with the other members of the Society?

A. All of the members.

Q. Now, if you attempted to protect your own rights without the help of any organization or association within the State of Nebraska, what would you have to do as a practical matter, and with your knowledge of the entertainment profession, to safeguard and protect your rights for public performance for profit?

Mr. Hotz: We object to that as not within the issues of this case. This bill has nothing in it nor has the complaint raised any issue, nor is there anything in our answer or the state law to cover the object of any organization for the purpose of policing their rights covering infringement. They can institute any sort of procedure they wish in connection with that. It is not within the bill and not within the issues. The Society operates in this state without any handicap on the matters which the attorney has directed to the attention of the witness.

The Court: I think the witness may state briefly.

Q. You may state, Mr. Buck, what you would have to do to go about it?

A. The first thing you would have to do is to hire an investigator in the State of Nebraska to investigate all establishments.

Q. Would one investigator be sufficient for 391 establishments?

A. It couldn't be done.

Q. How many investigators would you have to have for 391 establishments?

A. Conservatively three or four.

Q. And what salary would you have to pay a man to go [fol. 241] around and investigate these establishments?

Mr. Hotz: I object to that as immaterial.

The Court: Sustained.

Q. You would have to pay his salary?

A. Yes, sir.

Q. If any infringement was found, would you have to engage a lawyer?

A. Yes; engage a lawyer to bring suit in a court of law.

Mr. Hotz: Object to that as immaterial and calling for a conclusion of the witness, and a self-evident fact that lawyers have to be paid.

The Court: It has been stipulated the amount in controversy exceeds \$3,000.

Mr. Frohlich: I want to show the helplessness of an individual under this act.

Q. Would other writers and composers have to do the same as you, if they were to proceed individually to protect their rights within the State of Nebraska?

A. Every author and composer in this country would have to do the same thing individually.

Q. And every publisher would have to do the same thing?

A. And every publisher would have to do the same thing.

Q. If an author and composer resides many miles from the State of Nebraska, it would impose a greater hardship on them, would it not?

A. It is an impossible task; it is dealing with an impossibility that any single individual could cover the violations [fol. 242] of his works in a state.

Q. When you write a musical composition and have it published, is it frequently the case that your compositions have been manufactured by radio and phonograph companies or piano roll companies into mechanically reproduced compositions?

A. Yes.

Q. In other words, disc records and musical rolls have been made from your compositions from time to time?

A. That is right, because different rights flow from the Copyright Act.

Q. And one of the rights is to make a mechanical reproduction of your composition?

A. Yes, sir.

Q. Now, when these mechanical reproductions were made you were paid under the compulsory provision of the Copyright Act at the rate of two cents a disc record or piano roll, were you not?

Mr. Hotz: Objected to as not within the issues of this case, and having been answered by the witness, and this act applies to vocal and instrumental musical compositions.

Mr. Frohlich: Now, in the first place it is very important to the issues in this case, your Honors, because one of the rights we claim is completely destroyed by this statute, is the right of public performance for profit that would flow [fol. 243] from the public performance for profit of a mechanical disc or piano roll, because the act expressly applies not only to played music but every copy of the composition manufactured. It has been carefully drawn to bring in every form of reproduction of that musical composition. It is our contention that when disc records are made they are made by others whom we don't control, and are forced to put on a price schedule as called for by the act, and these people can take the records and bring them into the State of Nebraska and have them perform, and the copyrighter doesn't get a penny for it, and he can't collect anywhere within the state for that performance. That is very vital here, the construction of this part of the act.

Mr. Hotz: Your Honors, that statement isn't altogether correct. In fact, no part of it is correct. This act doesn't militate against anything of the sort, nothing of the kind. Any composer or author or publisher, any of the 123 publishers, that have rights, certainly this act doesn't exempt them from infringement. The only thing it does prevent is a monopolistic organization from coming into this state and fixing a price, if it can. That is all there is to this act, [fol. 244] and unless they can show by this witness in this question that this disc and musical records are in some way connected up with the act, it is absolutely immaterial. I can't find it in the act.

The Court: Read the question.

(Question read.)

The Court: Overruled.

A. Yes, sir.

Q. And under the compulsory provision of the copyright all other writers and composers and publishers throughout the country of musical compositions receive compensation under this compulsory license provision of the Copyright Act?

A. Equal.

Q. You, of course, know that the act provides that where the copyright licenses one record maker to make a record, then any other record maker in this country has a right, on paying two cents a record, to make as many as he pleases?

A. One phonograph company, that is right.

The Court: That is putting into the mouth of the witness what you say the law is.

Q. Isn't that the procedure in the musical profession?

A. It is the practice that the minute the author and composer and publisher gives to one phonograph company in the United States the right to reproduce that song on a record, every other company in the United States can also make [fol. 245] them at the same price.

Q. If you, Mr. Buck, were to grant somebody the right to reproduce a record of one of your compositions and other disc or piano roll manufacturers under this compulsory license provision of the act, made, manufactured discs and piano rolls of your compositions, could you in any shape, manner or form compel those manufacturers to put on the price of their records or rolls any schedule with regard to the use of public performance for profit within the State of Nebraska?

Mr. Hotz: Object to that as calling for a conclusion of the witness, and leading.

The Court: Sustained.

Q. Were many of your compositions recorded on the disc records?

A. Numerous ones.

Q. Can you give us the names of some of your compositions?

A. "Hello Frisco", "Tulip Time", "Sally Come Back In The Alley", "Garden Of My Dreams", and "No Foolin".

Q. And were many disc records made from the compositions you have just mentioned?

A. Many.

Q. Were disc records made by many manufacturers?

A. Many.

Q. Were many disc records sold throughout the United States?

A. They were.

Q. And some of them are now being sold throughout the [fol. 246] United States?

A. Yes, sir.

Q. Have you any control over any of these records?

A. I have not.

Q. Are they in your possession?

A. No.

Q. Is there any way in which you can compel anyone to affix any price on them?

A. No, sir.

Q. Would you be willing to have any manufacturer of rolls or records fix a price on the rolls or records with respect to public performance for profit?

Mr. Hotz: I object to that as calling for a conclusion of the witness, and immaterial.

The Court: You may answer yes or no.

A. Yes.

Q. Read the question.

(Question read.)

A. Well, in a sense I naturally would recapture the control. That is what I meant when I said yes; that is what I am addressing myself to.

Q. Assuming you now have to operate under the Nebraska Statute, and records are made from your songs, would you be willing to have some manufacturer put on the face of the record any schedule of prices for the public performance for profit?

Mr. Hotz: Object to that as not within the issues of this [fol. 247] case, and not within the Nebraska Act, there is nothing of that sort in there.

The Court: Overruled.

A. No.

Q. Mr. Buck, do you know something about the show business?

A. I do.

Q. Not only did you have experience with Ziegfeld, but did you have experience of your own as a producer of plays?

A. I produced plays myself.

Q. And have you kept in touch with the general profession of producing plays throughout the country?

A. Yes.

Q. Has there been any marked decline in the production of plays since the advent of radio?

A. Yes, a great decline in the actual production of plays in the theatre. Theatres are closed from Maine to California outside of a few major towns.

Q. I show you a schedule prepared from a trade paper called "Motion Picture Herald", dated November 17, 1934, and ask you whether you have ever seen that schedule before?

A. Yes, I have seen that before.

Q. Does that schedule purport to set forth the decline in the production of musical plays?

A. Yes.

Q. For a period of years?

A. Yes; dramatic and musical.

[fol. 248] Q. Would you say you agree with it, and that it is accurate and correct from your experience in the show business?

A. Yes.

Mr. Frohlich: Offer in evidence Plaintiffs' Exhibit Number 19.

Mr. Hotz: We object to this exhibit Number 19 because it has no bearing upon the issues in this case. There is nothing in the complaint and nothing in the answer or bill about it. It is a page taken from the "Motion Picture Herald" and purports to give the Broadway stage from 1920 to 1934, showing the relative declines and increases and so forth in connection with performances. The bill does not attempt to reach public performances of that type; that is, dramatic performances.

The Court: In any event it is hearsay and there is no foundation laid. Sustained.

Q. You know something of the music business, too, don't you?

A. I do.

Q. In your sixteen years as president of the American Society you have personally come in contact with every phase of the music business?

A. Yes, sir.

Q. And you know the history of a great many of the famous songs of the country?

[fol. 249] A. Yes, sir.

Q. And what they did financially?

A. Yes, sir.

Q. How many copies were sold?

A. Yes, sir.

Q. Did you cause a compilation to be made of songs that sold in excess of a million copies?

A. I did.

Q. Before I show you that compilation, let me ask you whether from your knowledge and experience since 1927, 1928 or 1929, or about that period, there was any falling off in the sale of sheet music in the United States?

A. Tremendous.

Q. And at the time that sheet music was falling off was radio becoming more prevalent and popular?

A. Yes.

Q. And did the time come when radio reception was possible in many millions of homes in the United States?

A. There are thirty million sets operating tonight in the United States.

Q. In your opinion, based upon your knowledge and experience did the operation of these radio sets affect the sale of sheet music?

A. It did.

Q. In what way did it affect it?

A. Well, it affected it primarily in the way of pianos and [fol. 250] the desire of people to buy sheet music. The writer of songs first wrote the songs, and besides expressing himself it was his desire to make a living primarily. To make that living, his living was derived first from the sale of sheet music, and secondly from phonograph records. Since the invention and tremendous vogue and popularity of radio, sheet music has fallen off and piano stores have been closed from Maine to California. There is a little economics involved in there too. People are not going down on the corner and buy four or five sheets of music when they can

turn on the radio for nothing and hear the greatest artists in the world. The same thing happened to the phonograph records, although at the moment they are coming back, and owing to this recent craze of so-called "swing music".

Q. Now, Mr. Buck, did you at my request prepare a compilation of musical compositions that have grossed in sales a million or over?

A. I did.

Q. I show you this compilation and ask you whether that is true and correct?

A. Yes, that is true.

Q. Made upon your own personal knowledge?

A. Yes.

Q. And from information received by you from the various publishers?

A. From the publishers who publish the music, and also [fol. 251] the composers—a royalty statement.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 20.

Mr. Hotz: It is interesting, but has no materiality.

Q. Mr. Buck, do you know of any musical composition that sold a million copies within the past five years?

A. No, sir; there isn't any.

Q. In the musical profession they endeavor to write songs that are very popular hit songs, don't they?

A. That is right.

Q. And there have been numerous hits in the last ten years, haven't there?

A. Many of them.

Q. Have any of those hits grossed a million copies of sheet music, to your knowledge?

A. No, sir.

Q. How many copies a day, as a rule, are sold of a hit song?

A. You mean copies a day, or today?

Q. I mean at the present time.

A. At the present time a hit is considered one hundred thousand copies.

Q. In your opinion and from your knowledge of the business, what is that decrease due to in that sale of sheet music?

A. We naturally believe it is owing to the use of radio—we believe that.

[fol. 252] Q. Is radio used a great deal in music?

A. Yes.

Q. When it is pleasing and entertaining is it played frequently over the radio?

A. There are nearly seven hundred broadcasting stations in the United States, and with the magic of its expression on a hook-up you can have a song hit tonight, and where ordinarily prior to the great popularity of the radio, a song would live ten or twelve years—it would take two years at least to go across the country—tonight Bing Crosby or John Boles will sing a song, and instantaneously, conservatively, thirty million people will hear him sing it. Consequently the song for a short time is a sure hit, but today it does not last six weeks. There is not a song hit in America that can last six weeks.

Q. Does this situation affect the author's royalty from the sheet music?

A. It naturally does.

Q. Are the authors' royalties today as high as they were in the days before the advent of the radio?

A. They have dropped seventy per cent.

Q. So that today the writer of a musical composition cannot look to more than thirty per cent on the hit number of what he could get fifteen years ago?

A. Not sheet music.

(Whereupon an adjournment was taken until 1:30 o'clock P. M.)

[fol. 253] Mr. Te Poel: The complainants move that the case be dismissed as to Grace Ballard, formerly County Attorney of Washington County, Nebraska, owing to the fact that she has recently departed from this life.

(Thereupon Mr. Gene Buck resumed the stand for further direct examination).

By Mr. Frohlich:

Q. Now, Mr. Buck, prior to 1914 what were the main sources of revenue that an author and composer derived when he wrote a composed musical composition?

A. The average song writer, so-called popular song writer's revenue was derived primarily from sheet music and phonograph records, but Victor Herbert, Jerome Kern, Berlin and myself, we were the men who wrote musical plays. Like I draw royalties on the Follies, and Herbert on Irene and numerous musical works.

Q. In other words, the writer or composer who wrote or composed musical compositions which appeared in musical plays, he was known as a production writer?

A. Yes, sir.

Q. And a writer who wrote and composed musical compositions to be sold to the public was known as a popular writer?

A. Most of the members of the American Society today are popular writers.

[fol. 254] Q. Does the Society also have in its membership production writers?

A. Yes, sir.

Q. Now, prior to 1914 the popular composer had two sources of revenue, the sale of sheet music and the compensation from the mechanical records, is that right?

A. That is right.

Q. A production writer had the same revenue, in addition to which he also received revenue from the production of his plays, and royalties based upon the office receipts?

A. That is right.

Q. After 1914 and down the years has that picture changed any way?

A. Yes, tremendously.

Q. Very briefly, what change has there been?

A. Well, the change has been with the popular song writer. As I stated here this morning, his income from the sale of sheet music has dropped eighty per cent, and dropped as far as phonograph records, ninety per cent. Now it is on the rebound a little bit on account of Goodman and like swing orchestras. Take the production writer and just look at the picture of the United States today. There aren't ten musical comedies playing in the United States today, and there are not three playing in New York City. When I was in the Follies, at this time of the year thirty-five musical plays would be produced.

[fol. 255] Q. Has the reduction in the production and the amount of musical plays affected the production writer today?

A. Yes.

Q. What is the cause of this reduction in musical comedy production?

A. Owing to the invention of the radio. Along comes the radio, this magic instrument, as I say, and it brings into the home great singers, and the theatre can't compete

with that. If I produce a show tomorrow night and engage Bing Crosby to sing, I can't pay his wages that the sponsors of a radio program will pay Crosby to sing before a vast audience, whereas if he were playing in my theatre I would have only twelve hundred or two thousand seats.

Q. Now, Mr. Buck, in 1914 the revenue derived by the writer, both popular and production writer, from performing rights, was, as you testified, practically nothing, is that right?

A. True.

Q. Since 1914 has the revenue from the public performance for profit of these writers, increased?

A. Yes, it has.

Q. And where does that revenue come from today?

A. From the public performance for profit. In fact, to be candid with you, the only outcome and the only outlook a composer and author has today for his initiative in creating public performance for profit is in the licensed establishment. If sheet music is gone, if the phonograph record [fol. 256] is gone, what is the incentive for a man gifted to sit down and write?

Q. And in what manner is this revenue from the public performance for profit now derived by the writers of popular and production music in the United States; where does it come from?

A. It comes from the American Society; that is the chief source of revenue for any composer and author in the United States.

Q. So that if the revenue from the public performance for profit derived from the American Society is lost, then is it your testimony that the authors and composers of music today would be without any substantial revenue whatever from any source?

A. With thirty-five years in the business as a writer and composer, and with my vast knowledge as president of this Society for sixteen years, yes, sir. That is all he has to look for.

Q. I show you a tabulation made up by your office at my request and ask you if this tabulation truly and accurately represents the number of licenses issued by the American Society to establishments throughout the country since 1922, in each and every state?

A. It does.

Q. Will you please look at that tabulation and give us the

total establishments now licensed by the Society in the [fol. 257] year 1939?

A. In the year 1939, as of June 30th this year, the total licensed establishments of every radio station, motion picture theatre, dance hall and restaurant in the United States totaled 30,824 as of this day.

Mr. Frohlich: I offer in evidence plaintiffs' Exhibit Number 21.

Q. I call your attention, Mr. Buck, to the fact that this tabulation commences with 1922. Did the Society issue any licenses to users prior to 1922?

A. Yes, sir.

Q. Many licenses?

A. Yes.

Q. Between 1914 and 1921 did the American Society issue many licenses?

A. Not many.

Q. As a matter of fact, it didn't obtain any substantial revenue until about 1922, isn't that right?

A. That is true.

Mr. Frohlich: I would like to offer in evidence plaintiffs' Exhibit Number 22, being a schedule which shows the diminution in the sale of sheet music and the diminution in the sale of phonograph records in the United States from 1927 down to 1933, taken from the records of the Department of Commerce and incorporated in the 1936 [fol. 258] hearings on the copyright bill. Is there any objection to its competency?

Mr. Hotz: No, we wouldn't make any objection to the competency of it, but my objection to it is that it is not down to date.

Mr. Frohlich: I couldn't obtain anything later.

Mr. Hotz: Therefore it has no probative force, as being too old and immaterial.

The Court: Have it marked as Exhibit Number 22.

Mr. Frohlich: That is all.

Cross-examination.

By Mr. Hotz:

Q. Now, when the courts in their various holdings discussed the distinction between public performance rights

and ordinary sale rights for sheet music and so forth, your organization then became active in the protection of the public performance rights, is that true?

A. That is right, sir.

Q. And at the present time your organization confines itself almost exclusively to the collection of money from the users of vocal and instrumental music performed for public rights; that is what you call public performance rights?

A. Primarily the protection of its members.

[fol. 259] Q. I understand that, but that is something else. The protection from the infringement is another thing.

A. Yes, sir, but that is what brought the Society into existence.

Q. That is one of the purposes of your Society, to protect your members from infringement?

A. To stop this wholesale piracy.

Q. The way you do that is to have an agent and organization in each state in the Union who looks after and detects infringements of public performance?

A. That is right.

Q. Just explain to the Court what you mean by public performance rights and what people in the State of Nebraska generally are subjected to the payment of fees for public performance rights.

Mr. Frohlich: I really object to that, your Honors, on the ground that it calls for a legal conclusion on the part of the witness.

The Court: Let him answer.

A. I would be very happy to answer that. There are ten broadcasting stations operating in the State of Nebraska tonight. If the broadcasting station operates in this state tonight that is not operating for purposes of profit, this Society gives them a free license. Out of 700 broadcasting stations in the United States there — about seventy universities and churches, and as long as they are not opening their [fol. 260] stations for the purposes of selling time for a five minute spread or spot announcement, or for a shorter period, or a half hour, the Society is perfectly willing to give its entire catalog to any municipal school or university or any broadcasting station that is not operating for purposes of profit. If that station sends out salesmen and they go to furniture stores and insurance companies and to

national advertisers to dispose of its time, that is when the Society asks that station to take out a license.

Q. Now, then in addition to the radio, what else is there?

A. The next phase of activity in this state would be the motion picture theatres in the state who publicly perform music for profit.

Q. And the hotels?

A. Yes. We also license the picture houses, and it is predicated on the number of seats in that picture house. The next group in that would be the dance halls in the State of Nebraska. After all, a dance hall has nothing but the floor and music.

Q. They pay licenses?

A. They take out a license predicated on the size of the dance hall and how much usage of music there is. The next is the hotels. If a hotel doesn't use music, we do not ask for any license, but if the hotel takes a name band orchestra and goes into the show business and uses our music for purposes of getting the public into the cocktail [fol. 261] rooms and to dance, then we ask them to have a license.

Q. Then in addition to the hotels and dance halls, what about the amusement parks and that sort of thing?

A. If that amusement park is operating for purposes of profit rather than space and luring customers in there, they take out a blanket license with the Society. May I say to you, it is very cheap.

Q. Do you mean then for your interpretation of the public performance for profit is any user of music that performs for the public where he might derive benefit from the playing of the music?

A. Where he wants to get the public into his place and do business and utilize music.

Q. Then in the hotel room, where they have music come into the room through broadcasting, how is that handled?

A. We won a decision in the Supreme Court of the United States on that question, and have never charged.

Q. That I am trying to get at is that the hotel rooms also pay that?

A. At the moment we are not collecting from them.

Q. What do you do in connection with the telephone company or branch of the telephone company that has that service?

A. We have nothing to do with the telephone company, sir.

Q. But I mean they have the connection?

A. The remote control by the telephone company from the broadcasting station into hotel rooms?

[fol. 262] Q. Yes.

A. We took the question into the United States Supreme Court and they upheld our rights, but we haven't exercised our right at this time.

Q. Now, how about such things as volunteer fire departments, the American Legion halls and things of that sort?

A. If the American Legion hall is running for purposes of profit, we don't charge the American Legion. I would like to answer that further. If someone hires the American Legion hall, and if the American Legion rent a user their hall, to a group of people who want to stage a dance for purposes of profit—

Q. (Interrupting.) Now, volunteer fire departments, where they conduct dances in municipal auditoriums, how is that handled?

A. No, we do not collect from volunteer fire departments. We are only collecting from people in the usage of music for purposes of profit. We don't collect from granges, American Legions, and we don't collect from municipalities. I can refute it to this record.

Q. Now, Mr. Buck, when this money is collected in for the public performance rights, the composer whose music has been played for public performance rights, he doesn't get the particular money that comes in; it goes into the coffers of the American Society, and there, through its Board of Directors, it is divided up into classifications to which the Board of Directors assign the various membership, is that right?

[fol. 263] A. That is right.

Q. In other words, if a composer who has—

A. (Interrupting.) Let me correct you, sir. The Board of Directors, they distribute it with every publisher and writer member in the American Society.

Q. There isn't any doubt about that. Now, how is that classification of the membership arrived at; who arrives at it and determines that?

A. The classification committee—there is this committee in the American Society. For the record here, all the money

taken in by the American Society is distributed fifty per cent to the publisher members of the Society and fifty per cent to the writer members of the Society. The twelve publishers who are members of the Board of Directors sit down and analyze the activity of the numbers, and the number of works in the catalog of that man; the catalog and quality of his works and the years of service that the Society has had accessibility to that catalog, and that Board is representative, sir, of the production publisher, the so-called standard publisher who publish what we call standard works, I mean like Mrs. Nevin's husband who wrote "The Rosary", and she is in this court room, the widow of him. They have representation on the Board. The popular song writer who writes a number of songs, they have representation on the Board.

Q. You say there are about one thousand composer members?

[fol. 264] A. That is right.

Q. I think that the exhibit you introduced here showed somewhat less than that; I think about 889 to 900.

A. Well, I am telling you as of today. We have taken in members; we have every month a membership committee that meets and reports at our Board of Directors, and we elect new members. I can give it with a degree of accuracy as of today.

Q. Now, among those one thousand members, the composer members, that get fifty per cent of the net receipts, there are classifications of those members that are made by the classification committee?

A. That is right.

Q. Now, you have been a member of that classification committee since its foundation?

A. And chairman of it.

Q. And you are president of the Society?

A. Yes, sir.

Q. And you are familiar with the subject matter of classification, I suppose?

A. Yes, sir.

Q. Now, please tell the Court as briefly as you can the various classifications.

A. I will be happy to do so.

Q. Go ahead.

A. First, I must prepare the Court so there will be no [fol. 265] false intimation in the background in the atmos-

phere of what is going on here. Ordinarily we would like to have a system of each time a number is performed that that person was paid for that individual performance.

Q. That is a physical impossibility.

A. You know that, sir. You know there were sixty-five million performances publicly performed in the United States last year, and it would take a city as big as Lincoln, Nebraska and all its clerks to analyze those programs and extract them.

Q. Get back to the question.

A. I am going back to the question. In the absence of that, we formed what we call a classification system, wherein representatives from the Board of Directors of every quality and nature of work would meet every three months, going over that member's work, his contributions, how many years he had been in the Society, the number of works contributed, the nature and quality of his works, the vogue and popularity of his works. That is the way we classify these members.

Q. How many are there? Give us the classifications; what I want are their classifications.

A. Of the exact classification?

Q. Yes.

A. First class is Double "A", the next is "A".

Q. How many members are there of the Double "A" class?

A. About fifty.

[fol. 266] Q. How much do they get per year?

A. About \$15,000.

Q. Are you in that class yourself?

A. No, sir, I am not, unfortunately.

Q. There are about fifty in that class, and they get about \$15,000 per year?

A. Yes, sir.

Q. What is the next lower class?

A. "A".

Q. How many are there of that number?

A. There must be about fifty.

Q. And what do they get per year?

A. About \$12,000 a year.

Q. Are you a member of that class?

A. No, sir, I am not. And if it is any information to you, owing to my activities in the Society as its president, such as at this moment—

Q. (Interrupting.) You are a member of one of the classifications, are you not?

A. I took myself out of Class "A", where I was since the foundation of the Society, and moved myself down.

Q. How long were you in Number "1" classification?

A. I was in classification "A"—first it was "AA" from 1914 up to six years ago, and I personally took myself out of that class owing to my inactivity.

Q. You haven't written any music or composed lyrics [fol. 267] for many years?

A. The last thing I did was the late Florenz Ziegfeld's last Follies he produced before he died in 1932.

Q. Go on with the rest of the classifications.

A. The next classification is class "Double B", then "B", then "Double C" and then "C".

Q. "B" is what? How many members are there and what do they get?

A. At the moment I can't tell you. I would be very happy to furnish this information.

Q. Couldn't you give us about what they are?

A. Yes.

Q. What are they?

A. I will answer you, and I trust this Court and you will accept this as approximate.

Q. All right.

A. I am not such a genius that I can tell you for sure. I imagine in Class "B" there would be—

Q. (Interrupting.) "Double B."

A. "Double A" fifty—between forty and fifty in "A". I imagine in "Double B", about forty in "B".

Q. Take it right down.

A. I have to wait a moment. In "B", about thirty or forty. In "Double C"—

Q. (Interrupting.) Give us the amount of the various ones.

A. Well, the top class gets about \$15,000.

The Court: "What do you mean by "top class"?"
[fol. 268] The Witness: "Double A".

A. (Continuing:) "Double B" gets about \$9,000, or \$8,000. "Single B" gets about \$6,000 or \$7,000. The next class, "Double C", gets about \$2,000.

Q. How many members in that?

A. In "Double C"?

Q. Yes.

A. I imagine about seventy-five or one hundred, and the same in "C".

Q. Then what is there?

A. The next class is called "C-1".

Q. What do they get?

A. They get about 1600.

Q. How many are there in that?

A. Well, in "C-1", I imagine there are about fifty or sixty.

Q. And then what?

A. The next class is the class called "Double D"; that gets about \$1200 a year, I imagine.

Mr. Frohlich: You mean each member of each class gets that much each year?

The Witness: Each member of each class gets that much each year.

Q. What is the next class?

A. Interspersed in between the classes—I want to straighten the record out while going down the road. In between I have skipped a couple, where I want to put it in. [fol. 269] There is such a thing as a permanent "A", such as a set classification, that a person derives, and there is a permanent "B", and there is a permanent "C"—as long as they live they get a set amount of money.

Q. What are those amounts and how many members are there in those permanent classes?

A. I imagine in the permanent "A" they get \$4,000 or \$5,000 a year; about ten. I imagine in permanent "B" they get about \$3500 a year; there are about ten or twelve in that class. In permanent "C" there is about eighteen or twenty. You realize, sir, I am guessing, without the accurate figures in front of me, but they are approximate.

Q. What is the lowest class after the last one you mentioned?

A. The lowest class is Number 4.

Q. How many are there in that?

A. Oh, I imagine in "4" there are about seventy or eighty.

Q. And they receive about how much per year each?

A. About \$40.00 a year—\$10.00 a quarter. They are people who have at some time or another written a song or two, but who haven't written anything that has attained any eminence in the Society, and they want to be members of the Society.

Q. Then you have a non-participating membership, do you?

A. Yes.

Q. How many in that?

A. I imagine the non-participating membership would [fol. 270] have about—may I correct this for the Court here, about this non-participating membership so that this won't be misconstrued? In the policy of this Society, if a man makes application for membership, and he is first put in a non-participating class for reasons of wanting to know his stability, whether he is going to remain a song writer, whether the quality of his work is such that he should be put into an active class, which is an active membership where we divide money, there is a very definite reason for that. If you are a music publisher and make application to the American Society, we take you in and we first put you in the non-participating class.

Q. How long does he remain in that non-participating class?

A. Until such time until some public performance is made in these United States of his work. A lot of those men in those classes don't have public performance. The minute they publicly perform, we make them active.

Q. Is there any fixed time they must remain in there, such as five years?

A. No, sir; they can stay in five minutes if they show activity or have publicly performed in the United States.

Q. When they first come in, they come into the non-participating class?

A. That is right.

Q. That is the way the members come in?

A. Every member comes in the American Society that way.

[fol. 271] Q. And then he stays in there until the Board of Directors through their classifying committee takes him out?

A. No, the classification committee has nothing to do with it. The Board of Directors elects him to membership, like the Bar Association or the Medical Association.

Q. After he is elected to membership, then how does he get into the various classifications?

A. You mean how he gets to his classification?

Q. Yes.

A. These classifications are used in the absence of the program system which would take a million dollars.

Q. I understand that.

A. You mean how does he become classified?

Q. Yes. Through the classification committee; you have already answered that.

A. Yes.

Q. And how many members are there from this list that you handed in of some one thousand members—as I say, nine hundred to one thousand members—that are in the non-participating class probably would be the difference of the sum total of those you have already mentioned, and one thousand, isn't it?

A. I don't think there are over one hundred non-participating members in the Society. He is a person with a desire and inclination to write, and he has written a song that is not publicly performed. That is why he is in the [fol. 272] non-participating class. The minute a publisher or writer shows in any licensed establishment in this country that there is performance of his work he is immediately made active, so I don't want any misinterpretation of a non-participant.

Q. The Society then is operated through a Board of Directors of twenty-four men, isn't that right?

A. That is right.

Q. Of twenty-four members?

A. That is right.

Q. And your articles of the association show how the members are elected?

A. That is right.

Q. And elsewhere here we have the members who make up that Board?

A. Yes.

Q. You are president of this Society?

A. Yes, sir.

The Court: He has testified to that.

Q. You receive compensation for acting as president, do you not?

A. Yes, sir.

Q. And that is paid by the American Society?

A. Yes, sir. But I would also like to put in the record in answer to that question, I served from 1914 to 1931 without a dime in salary.

Q. You get a salary now?

A. Yes, sir.

[fol. 273] Q. What do you get?

A. \$50,000.

Q. Per annum?

A. Yes, sir. I would like to straighten this out, too. Up to three years ago—let's put all the cards on the table, so that it won't inflame the imagination of the record—I got \$20,000 up to three years ago, then I got \$35,000, and as of January 1st, unrequested, I get \$50,000.

Q. What classification are you in?

A. I am in Class "BB". I put myself there.

Q. How much per annum?

A. That gives me about \$8,000, I think.

Q. Now, is Mr. Mills secretary-treasurer of the organization?

A. No, he is not. Mr. Mills is employed as chairman of the administrative committee of the Society.

Q. He receives a salary, too, in the administration of this Society?

A. Yes, sir.

Q. What salary does he get?

A. \$50,000 a year.

Q. That is the Mr. Mills who is in the court room?

A. He is here, and is going to testify and tell you about certain things.

Q. Mr. Paine also?

A. He is also here, and he is general manager at \$25,000 a year.

[fol. 274] Q. Are either Mr. Mills or Mr. Paine composer members?

A. They are employees of the American Society and run the operation of its business.

Q. You maintain an office in New York City?

A. We certainly do.

Q. What is the address?

A. 30 Rockefeller Plaza.

Q. You have employees?

A. We have.

Q. And run and operate the American Society of Composers, Authors and Publishers at that place?

A. We do. We have no magic to do this without employees.

Q. You have payrolls and pay your stenographers and clerks the same as anyone else in business?

A. Yes.

Q. Now, you also have in your organization a group that are called the publisher members?

A. That is right.

Q. And they consist of some one hundred and twenty-three or one hundred and twenty-five of the music publishers in the United States, is that right?

A. That is right.

Q. When a person composes a piece of music they have it copyrighted or they assign the rights of having it copyrighted to their publisher, is that right?

A. That is right.

[fol. 275] Q. The publisher sets it up in salable or usable form?

A. That is right.

Q. The publisher sells that music to the public that want it, the users that want the records?

A. You have forgotten a very important thing in painting that picture. The publisher, when he takes that copy of music I created, he must then create a demand for that music. That is a very important thing, a function besides printing sheet music.

Q. That is a matter of salesmanship?

A. That is right. That is a very important thing.

Q. And each one of those publisher members are members of the American Society of Composers, Authors and Publishers, is that right?

A. Yes, sir. We have no jurisdiction over any publisher who isn't a member.

Q. Of this one hundred and twenty-three, they are the largest and best music publishing houses in the United States?

A. I believe that is true.

Q. Each one of those publisher members receives money from the Society each year?

A. That is right—fifty per cent of the entire.

Q. How is that fifty per cent of the entire divided?

A. That is divided on the same system that the writers have. A group of twelve men representing the so-called standard publishers who publish higher class music such as [fol. 276] sacred music and the like, such as Carrie Jacobs

Bond's music. The group of publishers who produce works of like musical comedies and the popular works——

Q. (Interrupting:) Are put in different classifications?

A. Yes.

Q. How many classifications are there of the publishers?

A. Well, that I couldn't answer. I will be glad to furnish it to the Court. I imagine the publishers have similar classifications to the writers—maybe not as many classes.

Q. About what do the publishers receive from the first class in dollars and cents per year?

A. You mean the top ranking musical publishers?

Q. Yes.

A. Oh, I imagine \$100,000.

Q. How many in that classification?

A. I think two; it may be only one. May I say this to you, sir, I am not pleading any ignorance of this question, but I have never had anything to do with the publisher classification. The publishers settle their own classification affairs. While I sit as president of the Society, my presidency comes by virtue of being a member of the Board, and I have always maintained the position that no publisher member sitting at that side of the table has any right to tell a writer member of the Society how he should be classified, or where classified, and from the same viewpoint the writer members never entered in the publishers' activity [fol. 277] ties where they shouldn't. For the sake of the record, as the president of the American Society, I have attended every classification committee of the writers since its foundation, and never attended a meeting of publishers' classification in my life.

Q. Is there anybody here in your organization that can tell us about that?

A. Yes, sir. We have the general manager here, we have Mr. Paine and Mr. Mills who will enlighten you thoroughly on that question.

Q. In the distribution of this money, what amount or how much does the American Society get?

A. The American Society took in last year nearly six million dollars, and it cost eighteen per cent to operate, and the rest of it was distributed to its members and to fulfill a foreign obligation of about three hundred thousand dollars.

Q. The prices charged for the public performance rights in the State of Nebraska are fixed by your Board of Directors?

A. No, no. Let us get that straight. The prices as charged in the State of Nebraska—we sat down and negotiated, sir, so that we get the whole picture.

Q. Please answer my question.

A. I want to answer the question. You say we fixed it—we did not fix it. We negotiated with the National Association of Broadcasters who fixed it, and we sat down with the Hotel Owners Association and fixed it, and sat down [fol. 278] with the Motion Picture Operators of the State of Nebraska and fixed it. I want that record clear. There was a period of negotiations. It was not fixed by any individual writer or board of directors of the American Society. It was fixed by negotiation.

Q. But the price ultimately arrived at and accepted and made satisfactory to the National Association of Broadcasters and the American Society, that price was fixed and finally determined whether acceptable or not by your organization in New York, isn't that right?

A. That is true, with the other negotiators on the other side of the table. May I say about being satisfactory? I don't think it is satisfactory on either side.

Q. Were any bonuses paid in addition to the regular salaries and things of that sort?

A. The only bonuses ever in the history of the association, and Mr. Mills or Mr. Paine and myself—the highest bonus ever was \$5,000 Christmas present.

Q. When was that?

A. Last year.

Q. To each one?

A. Yes.

The Court: Each one?

The Witness: Yes, sir; I as president, and Mr. Paine as general manager, and Mr. Mills as chairman of the executive board.

[fol. 279] Q. There is no agency here in the State of Nebraska that fixes the prices that users here in this state conform to?

A. What we do, our representatives in the State of Nebraska knows about it.

Q. From information you send to him into the State of Nebraska?

A. Let me straighten you out. He knows what the agreement was made in New York by the Broadcasters in the State of Nebraska who are members of N. A. B. on the deal also. He didn't negotiate it personally—it was negotiated by the N. A. B. and Board of Directors of the American Society.

Q. In other words, his information as to what to charge comes from New York, and then he follows out your instructions and puts that into force and effect in the State of Nebraska?

A. That is right.

Q. And that representative of yours here in this state, what is his name?

A. Mr. Eugene Blazer.

Q. He has been your representative for a number of years?

A. Yes, sir; and very efficient.

Mr. Hotz: I will ask the reporter at this time in connection with Exhibit Number 16, whether or not you have had an opportunity to count the number of contracts in that exhibit?

The Reporter: I have not finished it as yet.

The Witness: About 390 in the State of Nebraska, I will tell you now.

[fol. 280] Q. Are there any users of vocal and instrumental music in the State of Nebraska that do not have contracts, where they just temporarily go in and furnish music like dances or something of that sort?

A. We never issue licenses to any singer. We only license the establishment, either the owner or dance hall or the man who controls the lease of the motion picture theatre. Never in our life have we issued a license to a human being.

Q. Whoever it is you deal with, in individual instances, there are no special contracts that are made up for them; you do have instructions of that sort, where they collect money from the various users?

A. Never from an individual performer in the history of this country—from the establishment or hotel or dance hall or broadcasting station or picture theatre.

Q. We will say it is a dance hall or something of that sort, where they occasionally have a dance.

A. That is right.

Q. Where your inspectors would go around and negotiate and make a deal right on the spot?

A. That is right.

Q. I presume there are quite a few of those in the State of Nebraska, are there not?

A. Yes.

Q. Will you give us such instances?

A. Yes. There are some of them that pay \$30.00 a year to [fol. 281] the American Society, and it gives them accessibility to forty-six thousand works from all over the world, without which they couldn't open the doors of their dance hall.

Q. You say there are forty-six thousand copyrighted works that the American Society has?

A. Forty-six thousand members, I wanted to say. I will correct myself. One thousand members of the American Society, and forty-four thousand members throughout the world who also go with the license we issue to these establishments.

Q. About how many pieces of copyrighted music would you say that the Society deals in the public performance?

A. How many, you mean, we have in our catalog?

Q. Yes.

A. For a user to use?

Q. Yes.

A. That is very difficult to say. I imagine he would have accessibility to three or four hundred thousand musical works or arrangements and also musical works. You must understand, sir, when I say that, I state that after a certain number of years according to the Copyright Act, the numbers fall into the public domain, but from then on such arrangements are made of classics which is copyrightable.

Q. They are copyrighted then again after that?

A. That arrangement is copyrighted, that specific arrangement.

[fol. 282] Q. Let us get this straight about publisher members. There are one hundred and twenty-five members that are designated as publisher members; they are the part of your organization that actually own the copyrights?

A. They do, yes, in the majority of cases, because the custom has been in the musical business when a composer

and author writes a song, they turn it over to the publisher who secures a contract from them at so much royalty, probably one or two cents, and for a production, six cents. That copyright is taken out by the publisher and that is why the publisher must be in the American Society.

Q. These publisher members each publish a catalog or have a catalog of the musical copyrighted compositions owned by their house, do they not?

A. Yes.

Q. But the public performance rights on each one of those catalogs by each publishing house is assigned to the American Society?

A. That is right; everything in their catalog is assigned.

Q. That applies to the State of Nebraska as well as elsewhere?

A. That is right.

Q. Those catalogs are available from those respective publishers?

A. They are.

Q. So that the public knows what each publisher has, the style, the kind and class of music, is that right?

A. Yes.

[fol. 283] Q. In dealing with the public performance rights it must come through the American Society?

A. That is right, because there are thirty thousand licenses and no individual publishing house or writer is capable of looking after his interests with the infringements from Maine to California.

Q. Of course, you don't know, and have no way of knowing, the number of individuals and composers that have made up that vast amount of music, do you?

A. Yes.

Q. How many would you say there were in the United States?

A. I have given you the accurate figures of the number under our control—one thousand writers. In that, so that the record will be straight, there are about two hundred estates in there; they are dead, such as Victor Herbert and Sousa. Their widows and their children get money just as if Sousa and Herbert were living.

Q. Through whatever classification they happen to be in?

A. And they happen to be in the best, although Herbert has been dead for fifteen years; also Sousa.

Q. These composer members, in addition to what they receive from the American Society for public performance rights, they also receive, do they not, through an arrangement with their publisher, a royalty on the music sold?

A. Absolutely; that is why he went to the publisher with the song, to get it published, because it is not under the [fol. 284] jurisdiction of the American Society until published.

Q. And they have got to come through the publishers in order to get any place with the American Society?

A. No, not necessarily.

Q. Then their music couldn't be published; they have to have a publisher?

A. When he starts.

Q. Do you know generally, and I think it appears in these depositions on file, what percentage or royalty they get for each piece of music sold, vocal and instrumental?

A. In the so-called popular song, such as any modern hit, what we in the trade practice call a popular song?

Q. It is three cents, isn't it?

A. Two in some instances.

Q. Between two cents and three cents?

A. It depends. A writer that is more distinguished, the more he can get.

Q. On that end of it, that is a matter of negotiation between the composer and the publisher?

A. Yes. The American Society has nothing to do with that.

Q. The composer gets his check for that royalty directly from his publisher for any amount he wishes to charge or whatever the deal is?

A. Whatever his standing is as a representative writer. He may have six cents if he is big enough and has written magic hits and there is a demand for his work. Irving Berlin publishes his own music.

[fol. 285] Q. Irving Berlin is an important composer and a member of your Society, is he not?

A. One of the original members of the American Society in 1914.

Q. And a publisher member?

A. Yes; he owns his own publishing house and writes. He has a tinge of genius.

Q. The matter of the collection of the public performance rights, if the user in the State of Nebraska refuses to pay

or refuses to accept the terms and conditions, how is that handled? Supposing the user of vocal and instrumental music in the State of Nebraska in dealing with the representative of your Society in the State of Nebraska, couldn't get together with him, and they refused to pay or said it was too much and wouldn't pay that amount, and they couldn't make a deal or a transaction satisfactory to your Society in accordance with the instructions from your office in New York.

A. That same goes with any business in the world. If there is no deal you don't want that, and then you don't use it.

Q. Then you furnish him with a typewritten or copy list of the copyrighted music you own?

A. No. We furnish any licensee with the American Society. We have no printed list.

Q. There is no printed list furnished?

A. May I say this so that the Court will have a clear conception of it.

Q. I want them to have a clear conception.

A. We have put in this record a list of the members of the American Society, every composer and author and every publisher, and it is very easy for a user of music who desires to use music for public profit, all he has got to do is look at that sheet music—there is the publisher and there is the writer, and if that fellow belongs to the American Society and he wants to use it, all he has got to do is find out whether the Society has control of it or not.

Q. By going to the copyright office?

A. No.

Q. By going to the music itself?

A. No.

Q. Now, Mr. Buck, isn't it true that the average operator of a hotel or broadcasting station who buys his music under contract, and is liable under the law for these public performance rights, has no way of telling what his musicians are going to play?

A. It is not true, and he is not running a good broadcasting station if he is operating that way. Even when there is remote control into the hotel, he should see the quality and nature of the works if he is running a good station, and that is the only kind he will run if he is smart.

The Court: Just a minute. Limit your answers to the questions.

[fol. 287] The Witness: I beg your pardon; I apologize to the Court.

Q. You think it is necessary under your viewpoint that a hotel proprietor or dance hall proprietor or any other user of music such as broadcasting stations, they must know and determine if they can't deal with you or won't deal with you, and they must then determine from each piece of music played, from the marks placed on it, whether it is copyrighted or not, and by whom?

A. There is not a copy of sheet music played unless the publisher's name and the author's name is on it.

Q. In the event the music comes into Nebraska from the National Broadcasting Station in New York, or the Columbia or Mutual, and it is sent in to WOW or the Central States Broadcasting Station in this state, and there rebroadcast, and assuming they haven't had any opportunity to deal with you, or have not dealt with you, what means or method would they have of knowing whether or not it was copyrighted?

A. I am quite sure with all the rights involved in getting a license from the United States Government that no broadcasting station in the State of Nebraska would indulge in any such activity even if they bought and paid for a sustaining program from New York. They certainly want to know the nature and quality of it, and that it was cleared, and if they bought a nationally known program like Charlie McCarthy or Toscanini's orchestra, they would [fol. 288] certainly know that stuff was cleared. The broadcasters are smart.

Q. Mr. Buck, the fact remains if they cannot deal with your Society with the amount of copyrighted music there is, speaking now of broadcasting stations, hotels and so forth, or don't deal with your Society, and assuming that they are acting in good faith and do not want to infringe on the copyrights, they have no alternative excepting to go to the sheet music and look on it and see in whose name it is copyrighted?

A. I beg to differ, sir. In operating a broadcasting station he pays the employees for a musical knowledge and to put on a program. A good broadcaster knows where to get a product from, and I hope he knows the nature and quality of his works. I am leading to this point, that the public domain has millions of works that are acceptable and that he can use.

Q. Who would know in your organization, would it be Mr. Blazer or otherwise, the amount of money paid to your Society in the State of Nebraska that is not covered by the contracts in Exhibit Number 16?

A. That is rather a complex question. If you will simplify it, please.

Q. I mean not covered by contract, but isolated.

A. What is Exhibit Number 16?

Mr. Frohlich: It is based on something not in evidence. [fol. 289] Mr. Hotz: I only asked him who would know it.

Mr. Frohlich: You asked him who would know something, which, I say, is not in the evidence.

A. If you will specify, I will be glad to answer, if you will tell me what contracts.

The Court: I don't think there is any place in the evidence for that question.

Mr. Hotz: I will withdraw the question.

Q. Now, what percentage of the publishers of the United States are members of the Society? I mean that are really in the business; I don't mean isolated publishers.

A. How many musical publishers in the United States?

Q. I mean what percentage of publishers of vocal and instrumental music used in the State of Nebraska, published by members of your Society?

A. I imagine about fifty per cent.

Q. What amount of the vocal and instrumental copyrighted music is vested in your Society in public performance rights?

A. You mean created in the United States?

Q. Yes.

A. As created in the United States and as written?

Q. Copyrighted in the United States.

A. That is a very difficult question to answer. I would imagine about seventy per cent of it, conservatively. That is all of it the people want to hear.

[fol. 290] Q. I think you stated clearly you did not publish a complete list of your copyrighted music?

A. We do publish a complete list of every publisher member and we do publish a complete list of every author and composer under contractual arrangements with the American Society, and all you have to do is get from the American Society that book as put in evidence. If you are run-

ning a broadcasting station or dance hall, and if you are using any of those, you are doing it without their permission. It is very simple.

Q. That is the way you have of notifying the public of the copyright?

A. That is right.

The Court: There is a continual flow of music. While I am talking to you now, men are creating and writing music—it couldn't be up to date.

Q. What if somebody uses one of those that is just published or copyrighted?

A. If he is a member of the Society there is no danger of that at all. It can't reach the user until it reaches that state of composition.

Q. Through the publisher?

A. Through the publisher, unless the man is so famous, as Mr. Berlin or Mr. Kern, who let bands introduce it before publishing. Mr. Victor Herbert used to do that, and Mr. Sousa used to do that with his famous marches. He [fol. 291] would write a march for a university or state or band and he would let them go ahead and use it before it was even published.

Q. Do you know the amount of music that was sold, vocal and instrumental; by the publisher members last year?

A. All I know, sir, is the sales of sheet music dropped from about seventeen million to two million in ten years. That will give you an idea. There is a cross section of the picture. It has dropped from seventeen million income to be distributed to the writers, from seventeen million to two million. That gives you some idea of what has happened.

Mr. Frohlich: Are you talking about 1933 for that two million, or down to the present time?

The Witness: 1933.

Q. You say you could not estimate the number of copyrights your Society now owns, you as president of it, that is, in the United States?

A. No, I could not.

Q. Or the public performance rights your American Society own?

A. Frankly, I couldn't give you an accurate picture.

Q. Can't you come within one hundred thousand of it?

A. No. May I say I can't?

Q. Who in your organization can?

A. I am going to answer that, sir. It is entirely possible Mr. Mills or Mr. Paine can give you with some degree of accuracy the number, as they are the actual technical runners of the American Society, just what it has in it. They [fol. 292] can be more capable of answering that particular question than I can. You will have that answered in the record here.

Mr. Hotz: With the permission of the Court and counsel, Mr. Bennett would like to ask the witness a few questions. Is there any objection to that?

Mr. Frohlich: Well, I have no objection, if Mr. Bennett will state his relationship to the National Association of Broadcasters and state for the record whom he represents.

Mr. Bennett: our Honors please, I am representing one of the defendants in this case, and happen to be a practicing lawyer in Washington, D. C., and one of my clients is the National Association of Broadcasters.

Mr. Frohlich: No objection.

Mr. Hotz: Mr. Bennett is also with the Department of Justice.

Cross-examination:

By Mr. Bennett:

The Court: Is there some special line on which you would like to examine?

The Witness: I will be glad to answer them.

Mr. Bennett: I would like to qualify some of the things [fol. 293] that were overlooked.

The Court: All right; proceed.

Q. Mr. Buck, you stated on your direct examination that you were present in Washington and appeared before the copyright committee of Congress on all of the statutes or bills which you testified were introduced in Washington?

A. Yes, sir.

Q. Do you recall appearing in Washington before the copyright committee of the House, or rather the committee on patents of the House of Representatives of the 71st Congress, second session, March 4th and 5th and April 2nd, 1930?

A. I do, yes. May I ask, is that the House? Will you specify who was the chairman at that particular time of that sub-committee? Was it Mr. Sirovich?

Q. I imagine so, but I can't state that. I would like to read the statement you made as appears in the official publication of the testimony, and ask you whether that statement was true at the time it was made; it is from Page 250.

The Court: You better first ask him whether he made it.

Q. This appears in the transcript of that record as part of your testimony and statement to the committee.

The Court: Just a minute. That is not pertinent at all.

Mr. Bennett: I think, your Honors, it is quite pertinent in line with Mr. Buck's testimony put in here.

[fol. 294] The Court: If you want to ask him whether he made such a statement, you may do so.

Mr. Bennett: I did ask him.

The Witness: I haven't heard him.

The Court: You didn't ask him whether he made any such statement.

The Witness: You haven't asked me yet.

Q. Did you testify before that committee?

A. Yes, I did.

Q. Will you read this statement and state whether you made it?

A. Why not ask the Court what it is? Let's have it out in the open here.

Q. I would be happy to read it.

A. Go ahead.

Q. "In former times they had told you about the American Society—a terrific monopolistic chimera that was just going to take the Victor Company and the motion picture industry right out of business. Let us put the cards on the table and see what the American Society is. The American Society is an organization which consists of all the authors and composers and their publishers in America."

A. It is entirely possible I said that as a salesman, like your pride of telling the people the N. A. B. is the greatest broadcasting organization in the United States, and as Mr. Ford said, he has the best car. It is entirely possible as [fol. 295] head man selling the music of this nation to users of this country, I am entirely capable of saying I

have the best product. It is very human, and I am entirely capable of saying that.

The Court: Just a minute. Just answer the question whether you made that statement or not.

A. (Continuing) I may have said that. I would like to read what the question was leading to that.

The Court: The question is, did you make that answer or not.

The Witness: I would like to read it.

The Court: He read it to you.

The Witness: It says there I said it. It must be true.

Q. Now, Mr. Buck, do you recall testifying at the hearing held March 21-24-25, 1932 by the committee on patents of the House of Representatives, 72nd Congress, in which you testified; do you recall that?

A. I testified, as I said, at every hearing before the Congress on anything pertaining to the copyright act. I don't know what I said. I did testify. What is the substance of that testimony, I can't recall at the moment. Tell me what I said.

Q. The record published of the committee hearings shows the following testimony: "Mr. Boland:"

A. He was the attorney for the Hotel Men's Association of the United States.

[fol. 296] Q. (Continuing) "The American Society of Composers, Authors and Publishers, I believe—I may be wrong—does not control much more than one-half of the popular music." "The Chairman: Why, Mr. Buck told me they control ninety-five per cent." "Mr. Buck: The copyrighted works." "The Chairman: Can you prove that to me?" "Mr. Buck: Yes." Did you make that statement, Mr. Buck?

A. It says it there. I don't recall it at the time. I am entirely capable of saying that. It depended on that question which was before the House at that time.

Q. Did you believe that statement to be true at the time you said it?

A. That we controlled ninety-five per cent of the music at that time?

Q. Yes, in 1932; March, 1932.

A. I am incapable of saying anything unless I really believe it, Mr. Bennett.

Q. Mr. Buck, in your direct testimony you stated that if it wasn't for the Society you would have to have personally three or four checkers or investigators in the State of Nebraska in order to check up on possible infringements of your copyrights?

A. As the law now stands, but if this law is passed, I would need one hundred.

Q. In the bill of complaint filed in this cause, on Page 14—[fol. 297] you signed the bill of complaint, I believe?

A. I did.

Q. (Continuing) This statement is made: "Complainant Gene Buck wrote the lyrics in many musical compositions for over twenty years last past, and from time to time he entered into contracts with various musical publishers, pursuant to which such publishers duly secured copyright in such respective compositions by publication, deposit and registration of the works as required by the Copyright Act." Do you own the copyrights of those works, Mr. Buck, or the publisher with whom you contracted?

A. The publisher owns them.

Q. Then am I right in believing that it would be the publisher who would have to check to determine infringements in the State of Nebraska?

A. May I correct you, Mr. Bennett, and say to you it so happens in the construction of the American Society that when a member signs an agreement, from the time he signs that agreement, an author and composer vests in that Society that performing right before it is ever published. It comes under the jurisdiction of the Society on its creation. I want to make that clear with this Court. The minute he writes that comes under the jurisdiction of the Society through a contractual arrangement.

Mr. Bennett: May I suggest for the record there is a copy in the record, and it shows as to whether it transfers [fol. 298] any rights prior to publication.

That is all.

Mr. Hotz: Would the Court consider it of any value right now if I read one of those typical contracts?

The Court: I presume it is in evidence.

Mr. Hotz: It is in evidence.

The Court: It speaks for itself, unless you want to make an argument, and have an argument with this witness. One of the troubles here is that the witness has construed a good many things that are in writing.

Further cross-examination.

By Mr. Hotz:

Q. Now, the point I want to get at is this: In the agreement you have with the—

Mr. Frohlich: Do I understand you are interrogating the witness?

Mr. Hotz: Yes.

Mr. Frohlich: I thought you had completed.

Mr. Hotz: Just one question.

The Witness: It is all right.

Q. When a member becomes associated with the American Society and signs one of these contracts such as Exhibit Number 14, which you have signed, you say every [fol. 299] other member must sign?

A. Publishers and writers have the same form of contract. There is no difference.

Q. They have the exclusive right of public performance in every musical work, and it shall be deemed assigned to the Society by this instrument, whether they have made any other assignment?

A. That is right.

Q. And that goes for future works and everything else?

A. If I go home tonight and write a song, the minute I get through it comes under the jurisdiction of the Society. Here is the distinction I want to make clear for the Court.

Q. Just a minute. I will let your counsel examine. That is all our cross examination.

A. All right.

Mr. Frohlich: No further questions.

Witness excused.

[fol. 300] EDWIN CLAUDE MILLS, was called as a witness in behalf of the complainants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. State your full name.

A. Edwin Claude Mills.

Q. Where do you reside?

A. New York City, in Shelter Island.

Q. How many years have you resided in New York?

A. About twenty-two.

Q. Prior to your coming to New York had you been engaged in any business in connection with the theatrical or entertainment professions in the country?

A. Yes; for many years previously I had been in practically all forms of show business.

Q. Had you any connection with any motion picture theatres at any time?

A. I ran a string of theatres in the south and southwest.

Q. Did you become familiar with the custom and practice of operating motion picture theatres?

A. All types.

Q. Did you have any connection with the stage in any manner?

A. I did.

[fol. 301] Q. Will you please state what that connection was and when it commenced?

A. Well, I produced dramatic stock, played travel and concert companies, all sorts of entertainment, and the legitimate in Texas, Oklahoma, Arkansas, Kansas and Missouri from 1911 to 1913.

Q. Did you have any experience with the stage after you came to New York?

A. No direct experience, but as an employee of the vaudeville protective association I had an opportunity to observe the operation, particularly of the vaudeville theatre.

Q. Vaudeville was prevalent in those days and was quite a business?

A. It was an enormous business.

Q. Is vaudeville practically finished today?

A. Yes, sir.

Q. When did you come with the American Society of Composers, Authors and Publishers?

A. In 1921 actively with it.

Q. In what capacity were you employed by this American Society?

A. Chairman of its administrative committee.

Q. Have you been employed by the Society ever since 1921?

A. Except from November, 1929 to March 1932.

Q. And during that period what were you engaged in?

A. I was president of the Radio Music Company.

Q. After you ceased your connection with that company [fol. 302] in 1932, did you then resume your employment with the American Society?

A. I did, as chairman of its administrative committee, as general manager.

Q. And then did the time come when your official position with the Society was changed?

A. Yes; some two years ago I was elected chairman of its administrative committee.

Q. And that is your present official standing with the American Society?

A. That is right.

Q. Now, in your business connection with the American Society did you have occasion to contact the various users of the performing rights of the works of the members of the Society?

A. Many times, yes, sir.

Q. Were you with the Society when the motion picture theatres became active in the use of American Society music?

A. Well, the motion picture theatres had been active in the use of American Society music since the beginning of motion pictures. I was with the Society at the time of the first negotiations between the Society and the motion picture theatres.

Q. In what year were those negotiations?

A. They started in 1919. I testified a moment ago I went with the Society in 1921. I had been acting in an advisory capacity in the Society without fee since the middle of 1919.

Q. But you became officially connected with the Society [fol. 303] on a salary basis in 1921?

A. Yes, sir.

Q. During that period from 1919 and thereafter did you personally conduct the negotiations with the motion picture theatres with reference to license fees?

A. Under the authority of the Board of Directors, yes.

Q. Do you recall the names of the various groups of associations, trade organizations of the motion picture theatres in those years?

A. Well, the first organization, national organization, with whom we were successful in making a contact, that is, getting them to sit down and talk the thing over and

stop attacking us, was the Motion Picture Exhibitors League, of which Sidney Cohen, now deceased, was the president. We had had and attempted to make, sometimes successfully and sometimes unsuccessfully, contacts with a great many of the state organizations of motion picture theatres. The names of the individual associations I don't recall, except I recall New Jersey, Kansas, Texas and California.

Q. There was one in New York?

A. Yes; and Wisconsin. Definitely in New York, yes.

Q. Did a time come when you acting on behalf of the American Society, negotiated a form of contract with the motion picture theatres?

A. A number of different times. The first contract we succeeded in negotiating with the Motion Picture Exhibitors [fol. 304] League after the first copyright hearings in Washington, which I remember were about 1922, and proposals had been made there to amend the copyright law.

Q. Were you present at those hearings from time to time?

A. Yes, sir.

Q. Can you refresh your recollection from this document as to when the hearings were held and bills were introduced in Congress from 1924 down to 1936, affecting the copyright act?

A. As to all of these except those on which hearings were held in 1931 and 1932, I attended the hearings and testified at many of them.

Q. I show you a tabulation, according to years, setting out the various bills introduced in Congress from 1924 down to 1939, affecting the copyright act of 1939, and ask you whether that was gotten up pursuant to your direction?

A. Oh, yes; I made this myself.

Q. Does that truly and accurately represent the bills introduced in Congress during that period?

A. According to the best records we have, it includes all the bills. We think there are some bills not included. It is not all inclusive.

Q. Will you hold this document in your hand? What year was the Dill bill presented?

A. In 1924, the 68th Congress and first session.

Q. What, if you know, was the important amendment in that bill with respect to performing rights for profit?

[fol. 305] A. Well, the bill's purpose was to declare a performance of a copyrighted musical composition by radio

or broadcast or radio telephone should not be considered a public performance.

Q. That bill never passed, did it?

A. No.

Q. Were you present when any hearings were held on the bill?

Mr. Hotz: I object to that as incompetent and immaterial and not within the issues of this case. Here is a witness who has appeared before various committees in Congress.

The Court: I assume it goes to the purpose and necessity for the organization.

Mr. Frohlich: It is simply to show who sponsored those bills from time to time in Congress, and who appeared in favor of those bills, because I think it gives the Court a history and picture of what has been attempted by the users of the copyright over the years. I will be very brief with it, and I have only a few questions on it.

The Court: Well, go ahead.

A. Yes.

Q. Do you recall who appeared in favor of the bill?

A. Yes.

Q. Who?

A. Organizations representing the broadcasters, the associated Broadcasters, the motion picture theatres, the hotel [fol. 306] owners, the dance hall proprietors, representing all organizations of users in commercial public performance of copyrighted works.

Q. Were you present when any Senate bills were introduced along the same lines?

A. Yes, sir.

Q. Do you remember the Duffy bill introduced by Senator Duffy?

A. Yes, sir, very well.

Q. Were hearings held on that?

A. Yes, sir.

Q. Were you present?

A. No, sir.

Q. You were not present then?

A. No, sir. I was away from the Society then.

Q. Now, Mr. Mills, you testified you assisted in the negotiations, or participated in these negotiations between the Society and picture people that resulted in a contract. Do

you recall the terms of the first contract with reference to the compensation to be paid by picture theatres for use of music?

A. Yes; they were to pay five cents per seat per annum, and if they operated four or less days per week they were to pay two and a half cents per seat.

Q. Were those sums paid by the pictures?

A. Not universally or unanimously or agreeably paid—when we could collect them.

[fol. 307] Q. Did the time come when you entered into further negotiations with the picture people?

A. Yes, sir.

Q. Were these terms changed?

A. Yes, sir.

Q. Will you please state what the change was?

A. The rate was increased under the negotiations to ten cents per seat per annum, and five cents in a case of a theatre operating four or less days a week.

Q. Were negotiations conducted with a trade association representing the theatres?

A. In both cases, yes, sir.

Q. By the way, when was the second contract made with the picture companies?

A. I would say in 1928.

Q. Was any further contract made with the picture theatres?

A. Yes, sir.

Q. About when?

A. In late 1932 or early 1933.

Q. Have the rates been changed?

A. Yes; the rates were again increased by negotiation.

Q. And what are the rates now?

A. They are on a sliding scale now, with a maximum of twenty cents per seat per annum for theatres having a capacity of more than two thousand seats, and fifteen cents per seat per annum for theatres with fifteen hundred to two [fol. 308] thousand seats, and ten cents in the lower bracket seating capacity.

Q. Are those rates now in force in the State of Nebraska?

A. Yes, sir.

Q. By the way, in the conducting of these negotiations with the picture theatres and further negotiations with respect to users throughout all this period from 1921 did any

individual member of the Society, whether an author, composer or publisher, himself or itself have anything to do with fixing the price for the particular use of music?

A. Only to the extent he authorized his Board of Directors to fix the rate.

Q. In other words, the Board acted on behalf of the members?

A. All members.

Q. The Board, in the last analysis, fixed the price?

A. No, it didn't

Q. It made the rate?

A. These prices were fixed on the basis of negotiations between committees representing the Society and the users. We never dealt with an individual user.

Q. Perhaps you have not understood my question. The individual members didn't ever have a voice in agreeing or coming to a price of any kind, did they?

A. Not in specific and direct relations.

Q. It was always the Board of Directors or the general manager who fixed the fee or suggested a fee, and then conducted negotiations along the lines trying to obtain this fee?

A. Without exception.

Q. Did you conduct negotiations with radio broadcasters?

A. Yes.

Q. When were the first negotiations held with the broadcasters?

A. In September, as I recall it, 1923 when broadcasting was first becoming popular. We called a conference of the representatives of the then broadcasting stations, of which there were but a few.

Q. Where was that conference held?

A. In our office at New York City.

Q. Do you recall who was present on behalf of the broadcasters?

A. Yes. You mean the persons or the organizations?

Q. First, the persons.

A. Well, the American Telephone & Telegraph Company was represented by Mr. Harkness, Mr. McCielland and Mr. White. The General Electric Company was represented by an attorney from the offices of Craveth, DeGierseorf, Swaine & Wood. The Westinghouse Electric & Manufacturing Company was represented, as I recall it, by Mr. Charles H. Tuttle. Station WJAZ of Chicago owned by the Zenith

Radio Corporation, and a number of the other then Chicago stations were represented by Eugene McDonald. There were a few other scattered representatives there, whose names I don't remember, one from Boston and one from Cincinnati.

Q. Did these negotiations result in an agreement between [fol. 310] the Society and the organizations you have just mentioned, with respect to licensing radio broadcasting stations for performing rights of music?

A. No.

Q. Were there any further conferences after the one you described?

A. The first conference was in September and was adjourned to October, at which everyone was going into the whole proposition over the basic problem, being whether or not the broadcasters would concede that performance by radio was a public performance and was a performance for public profit, and at the October conference the broadcasters advised us they reached the conclusion their performances were neither public nor for profit.

Q. At or about that time in 1923 were the motion picture theatre people active in a controversy with the Society?

A. Oh, yes.

Q. Did the motion picture theatre people make complaint to the Federal Trade Commission?

A. They did, and also to the Department of Justice and Post Office Department and to Better Business Bureaus and to Bar Associations.

Q. Did the Federal Trade Commission investigate the Society?

A. They did. We afforded them access to our files and records without any reservation whatever, and we went to Washington and testified.

[fol. 311] Q. Did you in 1923—and when I say you, I mean the American Society—receive notification of the decision of the Federal Trade Commission with respect to its investigation?

A. Yes, sir.

Q. I show you this copy of a document dated January 2, 1923 and ask you whether you ever saw the original?

A. Yes, sir; the original is filed around in some of these papers and courts as an exhibit.

Q. Is the copy you now have in your hand a true and accurate copy made under your supervision?

A. Yes, sir.

Q. Was the original received by you?

A. Yes, sir.

Q. Addressed to Mr. Sidney S. Cohen?

A. A carbon copy was sent to us.

Q. Of the motion picture theatre owners of America?

A. That is right.

Mr. Frohlich: I would like to offer in evidence plaintiffs' Exhibit Number 23.

Mr. Hotz: Objected to as prejudicial to our rights in this case. It purports to be a letter written by the Federal Trade Commission to Sidney S. Cohen, President of the Motion Picture Theatre Owners of America in 1923. It states that the Federal Trade Commission has made an investigation and so forth of this Society in 1923, and what [fol. 312] they did in 1923 and what they are doing today may not be so good. It may not show up according to their own testimony. It is immaterial.

The Court: What part are you objecting to?

Mr. Hotz: Objected to as prejudicial and immaterial.

The Court: Overruled.

Mr. Hotz: There is no proper foundation laid, and the further objection it is an unsigned letter and it is incompetent and immaterial, and is a self-serving declaration.

The Court: By parties to this suit?

Mr. Hotz: No, your Honor.

The Court: Then why it is a self-serving declaration?

Mr. Hotz: Because of the fact that it mentions in the body of the letter the American Society. But it purports to be signed by the Federal Trade Commission. It is a copy of a letter, and says it is a copy of a letter addressed to Mr. Cohen. Further object to it as hearsay.

The Court: What does it say?

Mr. Hotz: Exhibit Number 23 states they have examined this Society and as a result they concluded "that the case is not one calling for the exercise of the Commission's [fol. 313] corrective powers." "The chief reason for this conclusion may be stated as the fact that the making of a claim for royalties apparently in good faith, cannot be said to constitute an unfair method of competition in commerce."

The Court: How is that prejudicial?

Mr. Hotz: It doesn't give us a chance to answer or find out anything about it. It might be.

The Court: Objection sustained. There is not sufficient foundation for it.

(Short recess.)

Q. Mr. Mills, in the years 1924, 1925 and 1926 was litigation going on between the American Society and the radio broadcasters with respect to the construction of the copyright act?

A. Yes, sir.

Q. As a result of that litigation there were decisions by the courts in favor of the Society?

A. There were decisions by the courts construing the law as applicable.

Q. Holding that the performance in a broadcasting studio was, in effect, public performance for profit?

[fol. 314] A. Yes, sir.

Q. Did a time come when you, on behalf of the Society, had further conferences and negotiations with the broadcasters?

A. Yes, sir.

Q. Did these conferences and negotiations result in a contract between the Society and the broadcasters?

A. In 1932, yes, sir.

Q. That was your first contract, wasn't it?

A. The first uniform contract.

Q. In those negotiations and in that contract were the broadcasters represented by any trade organization?

A. Yes, sir; by the National Association of Broadcasters.

Q. How many broadcasters were there in existence at that time?

A. About four hundred, as I recall.

Q. About how many of those four hundred were members of the trade organization?

A. I don't know.

Q. But, at any rate, the National Association of Broadcasters was active in the negotiations that led up to the contract, is that right?

A. Purported to represent the entire industry and conducted the negotiations on behalf of the entire industry.

Q. Represented by counsel as well?

A. Yes, sir.

Q. You had conferences with their counsel?

A. Yes, sir.

[fol. 315] Q. The contract of 1932 was for how long a period?

A. Three years.

Q. At its expiration were there further negotiations with the broadcasters with respect to renewal of the contract?

A. With the National Association of Broadcasters.

Q. Again the National Association of Broadcasters was in the picture with its counsel?

A. Yes, sir.

Q. And you negotiated with the representatives of that association and its counsel?

A. With a committee appointed by the Board of Directors, N. A. B. and its counsel.

Q. These negotiations, did they result in a contract?

A. They resulted in a renewal of the existing agreement.

Q. For how long a period was the existing agreement?

A. The existing agreement was for a period of three years—1933, 1934 and 1935.

Q. In 1935 were there further conferences with the broadcasters?

A. Yes, sir; those are the conferences regarding which I have just testified.

Q. Was a contract made in 1935 between the Society and the broadcasters?

A. An agreement was made to renew the contract then in effect, for an additional term of five years.

Q. So that all those contracts now expire by limitation of time by the end of 1940?

[fol. 316] A. They all run concurrently to December 31, 1940.

Q. About how many broadcasters are there in the United States at this time?

A. Commercial stations, about six hundred; altogether something between six hundred and seven hundred stations.

Q. Do you know how many of those stations belong to the National Association of Broadcasters?

A. I do not.

Q. Do you know and have you information with reference to the operations of broadcasters today; do you know how they conduct their business?

A. In general, yes, sir.

Q. Under their contracts with the Society, the broadcasters have been required from time to time to furnish reports of their operations, haven't they?

A. Yes, sir, a few of them.

Q. Hasn't the Society also made periodic surveys of their broadcasts with a view to ascertaining the compositions performed by the broadcasters?

A. Yes, sir.

Q. Do the broadcasters from time to time send in their programs at large to the Society?

A. Yes, sir. Not all of the broadcasters. A selective group of broadcasters do from time to time.

Q. That is done by the Society with a view to ascertaining the uses made of the music of its members so that [fol. 317] proper classification may be given to its members?

A. So that we can ascertain relatively the compositions of which members are contributing most to the earnings of the Society, so that they may participate proportionately in the distribution.

Q. The broadcasters are divided into groups, aren't they?

A. Groups of broadcasters, yes; the networks and the independents generally.

Q. How many networks are there?

A. Four principal networks.

Q. Will you please name them?

A. Those operated by the National Broadcasting Company, the Columbia Broadcasting Company, the Mutual Broadcasting Company, and then I don't recall the corporation name that operates it.

Q. Is that the one known as the Blue Network?

A. The Blue Network and the Red Network are operations of the National Broadcasting Company.

Q. These networks are also called chains, are they?

A. Yes, sir.

Q. Their operations are by means of broadcasts in their own studios and hookups by means of telephone wires coming into the various stations throughout the United States?

A. The program originates in a key station, which may be any station among those stations hooked up for the network broadcast and interconnected by telephone lines with [fol. 318] a program which is rendered in the key station and is broadcast simultaneously and transmitted simultaneously to all interconnected stations and broadcast simultaneously by them to their respective listening areas.

Q. Now, have these chains any hookup with the broadcasters in the State of Nebraska?

A. Yes, sir.

Q. Are there about ten or eleven broadcasters in the State of Nebraska at the present time?

A. Yes, sir.

Q. I show you these maps of the National Broadcasting Company, the Mutual Broadcasting Company and the Columbia Broadcasting Company, and ask you whether these accurately represent the chain systems of broadcasting by these respective chains?

A. Yes, sir.

Q. All over the United States?

A. Yes, sir.

Mr. Frohlich: I would like to offer in evidence plaintiffs' Exhibits Number 24, 25 and 26.

Mr. Hotz: We object to them as incompetent and not made by the witness; they are irrelevant because they do not tend to prove or disprove any of the issues in this case.

Mr. Frohlich: I am laying a foundation, your Honors.

[fol. 319] The Court: Objection sustained.

Q. I show you a list of broadcasting stations within the State of Nebraska, and ask you whether you can tell from this list which of these stations are affiliated with the national chains?

A. Yes, sir. You want me to call off the stations?

Q. Call off the names of the stations.

Mr. Hotz: In Nebraska?

Mr. Frohlich: In Nebraska.

A. Station KFAB at Lincoln, Nebraska, operated by the Central States Broadcasting System is on the chain of the Columbia network operated by the Columbia Broadcasting System, Incorporated, and having its general offices in New York City. Station KFOR of Lincoln Nebraska is on the network operated—I withdraw that; that doesn't seem to be a network operation now. It used to be. Station WOW in Omaha, Nebraska on the network operated by the National Broadcasting Company, general offices in New York City. Station KOIL of Omaha, Nebraska is on the network operated by the Columbia Broadcasting System. I think that is all.

Q. Now, Mr. Mills, when these networks broadcast a performance outside of the State of Nebraska that performance appears simultaneously in all the stations affiliated or hooked up with the network at the moment, doesn't it?

A. Yes, sir.

Q. So that a station in Nebraska which is affiliated with [fol. 320] the Columbia Broadcasting System, and a performance is given in the studio of the Columbia System in New York or Hollywood, that performance comes in under the hookup within the State of Nebraska, doesn't it?

A. If the station is taking that particular program, yes.

Q. And that applies to the three stations you have mentioned in Nebraska with respect to those particular chains?

A. Under those circumstances, yes, sir.

Q. Are many of the compositions of the American Society members performed in network broadcasting?

A. Yes, sir.

Q. You know that from your own knowledge and reports of the broadcasters over many years?

A. Yes, sir.

Q. And a great many compositions are performed outside of the State of New York and reproduced by network hookups in the State of Nebraska?

A. Yes, sir.

Q. I show you a document which was furnished to you, and ask you whether you recognize it?

A. Yes, sir.

Q. Will you please describe that document and tell us what it is?

A. This is a list of compositions transmitted by the National Broadcasting Company in network broadcasts to Station WOW in Omaha, Nebraska during the week of June [fol. 321] 28, 1937 to July 4, 1937.

Q. And that was after the passage of this act in Nebraska, is that right?

A. Yes, sir.

Q. That was furnished to you by the National Broadcasting Company?

A. That is right.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 27.

Mr. Hotz: Objected to as not the best evidence and merely hearsay, and the witness not shown to be qualified to answer.

The Witness: That is not hearsay. I know about that.

Mr. Hotz: You don't know about each one of these individual pieces.

The Witness: I know it was furnished to us by the National Broadcasting Company as a statement of the compositions it had broadcast to that particular station by network.

The Court: In the regular course of your business?

The Witness: Yes, sir.

Mr. Hotz: He is not in the National Broadcasting business.

[fol. 322] The Witness: I am in the American Society and receive this from them every day, year in and year out.

Mr. Hotz: May I ask the witness whether or not you license the National Broadcasting Company?

The Witness: Yes, sir.

Mr. Hotz: The best record, of course, would be the records of WOW to show what they used or didn't use.

Mr. Frohlich: This is a record furnished by them to us, by the National Broadcasting Company.

Mr. Hotz: I said WOW. I am not ready to admit that. We object to that as not the best evidence.

The Court: What is the testimony as to how this came into his possession?

Mr. Frohlich: This is to show, your Honors, that the compositions of the members of the Society are continually broadcast, and here is a week. I could come down with three hundred weeks, each week of the year. These compositions were broadcast outside of the state, and rebroadcast by this hookup within the State of Nebraska, and to me it is very important because this statute frees such broadcast to the broadcaster in the State of Nebraska if the compositions are owned by members of the Society. That is [fol. 323] very material.

The Court: I haven't in mind the materiality exactly. What is the witness' testimony with reference to this document, how it came to him or his associates?

Q. Can you tell us in detail how you got possession of this document?

A. Under the contracts between the Society and all broadcasting stations the Society has the right to demand of the stations from time to time a list or log of the compositions which they perform, and in case of a network broadcast

the so-called traffic sheet which shows the stations that were interconnected for the purpose of receiving the broadcast. Under that clause in our contract we from time to time request the broadcasting stations to furnish us their programs, and in response to that program and pursuant to their obligation under the contract, the National Broadcasting Company, the Columbia Broadcasting Company and other networks, and individual stations, furnish us, we presume honorably and honestly, and we have no reason to believe otherwise, complete lists of the compositions they broadcast program by program, and in each case accompany the program by the traffic sheet which shows how many and what stations specifically received a rebroadcast of that program.

Q. Did you, pursuant to a request made upon the National Broadcasting Company, obtain from them this particular [fol. 324] document?

A. I cannot so testify. I repeat that this looks like one of them. We receive thousands, and I presume it is, but that particular document, of course, every rule of reason will tell you it would be impossible to so testify.

Q. It isn't prepared on paper or typewritten in your office, is it? You can recognize that.

A. It is prepared by the National Broadcasting Company.

The Court: Objection sustained.

Q. I show you a document entitled, "Census of Business, 1935, Radio Broadcasting" of the United States Department of Commerce, Daniel C. Roper, Secretary, Bureau of the Census, William L. Austin, Director, dated October, 1936, and ask you whether you have seen that before?

A. Yes, sir.

Q. I direct your attention to Page 59 of that document, Mr. Mills, and ask you whether that page contains some statistics with reference to radio broadcasting within the State of Nebraska?

A. Yes, sir.

Mr. Frohlich: I would like to offer in evidence Exhibit Number 28, prepared by the Department of Commerce.

The Court: It purports to be one of the publications of that Department?

[fol. 325] Mr. Frohlich: It does, your Honor; it is a government publication.

Mr. Hotz: In reference to the offer of Exhibit Number 28, we do not object to the competency of the line after "Nebraska" in the report on Page 59, which is a compilation by the United States Department of Commerce for the year 1935, but we object to it as wholly immaterial and having been made four years ago, and irrelevant to the issues of this case.

Mr. Frohlich: It is just offered for the purpose of proving the amount of money taken into the State of Nebraska in that one year.

The Court: Objection overruled, but the offer will be limited.

Mr. Frohlich: I will limit it to one bit of information, your Honors. It shows ten broadcasting stations within the State of Nebraska which took in, in net revenue, from the sale of time in the year 1935, \$510,000. For that limited purpose only, I want to offer it. They took in that much business from their activities.

Mr. Hotz: You mean the Department of Commerce showed for the ten stations in Nebraska gross income of \$510,000.

Mr. Frohlich: It doesn't say "gross"; it says "net revenue from sale of time".

[fol. 326] The Court: What difference would it make if it were that much, or \$100,000 less?

Mr. Frohlich: Those are the approximate figures. I want the Court to know the amount of business done by the users.

I offer in evidence plaintiffs' Exhibit Number 29, being a document issued by the Federal Communications Commission, dated June 6, 1938, on Page 19 of which there is set forth the number of stations in Nebraska and the amount of revenue and net sales of time on the air for the year 1937.

Mr. Hotz: Not that we demand any proof as to competency of the Federal Communications Commission publication of June 6, 1938, but we object to the materiality of it and the relevancy of it, and we object to it for the reason that there is no way of checking its accuracy.

Mr. Frohlich: Your Honors, the figures show a decided increase just in two years, and I have some other statistics which I will bring down to date.

The Court: Limit your offer to this one page.

Mr. Frohlich: It will be limited to this one page. In fact, [fol. 327] I have to limit it further because there are other

stations on that page. I will offer it as to one line on that one page, plaintiffs' Exhibit Number 29.

Mr. Hotz: It shows gross sales in Nebraska of \$1,110,449.

The Court: How much is that?

Mr. Hotz: It shows gross sales under column 8, in the State of Nebraska for all of the Nebraska stations of \$1,110,449.

The Court: Is that simply to show it is an important business?

Mr. Frohlich: It is a tremendous amount of money.

The Court: In volume, that is the only purpose?

Mr. Frohlich: That is the only purpose, and this is my last on that point, which will bring it down to date.

Mr. Hotz: You don't mean to say that is for everything the stations did?

Mr. Frohlich: No.

Mr. Hotz: That is all sales of time on the air?

Mr. Frohlich: Everything. I will grant all.

Mr. Hotz: Not necessarily music?

Mr. Frohlich: No; all their time on the air.

[fol. 328] Mr. Frohlich: I have an official publication issued by the Department of Commerce and by the Electrical Division, John H. Payne, Chief, bearing date of May 15, 1938, which on Page 15 are some important statistics with reference to radio as an industry, computed down to 1938, showing the amount of radio sets sold, time on the air, homes with radios, what the public paid, and matters of that kind, which I think would be helpful as showing what is involved in this controversy.

The Court: Is that in the United States or in Nebraska?

Mr. Frohlich: That is for the United States, throughout the country.

Mr. Hotz: We object to that as incompetent and irrelevant to the issues of this case, and it is immaterial and doesn't purport to show or give any method by which could be determined anything in connection with the State of Nebraska.

The Court: What is the materiality of that?

Mr. Frohlich: The amount of music in an industry which depends upon music; the amount of revenue derived by the industry throughout the country; the amount of money invested and involved; what the public pays just to one in-
[fol. 329] dustry to listen to music, and taken in conjunction

with the fact that our rates are before the Court. We have filed with the Court as exhibits the amount of money we have got in from every State of the Union from 1922 down to date. We have shown what we charge; we want to show our rates are reasonable in comparison with the growth of this tremendous industry. We are not oppressive, we don't try to extort unfair amounts from licensees; we have charged a very modest royalty.

The Court: There is nothing to show that this is music, is there? These programs aren't all music?

Mr. Frohlich: No, they aren't. That would be an impossible task, because it would mean the breaking down of every single program every hour throughout the United States. It shows the industry as a whole.

The Court: What materiality would it have then? Half of it may have been a political campaign.

Mr. Frohlich: All of us know without putting it in evidence that radio furnishes a great deal of music, and that it couldn't get along without that, it couldn't operate its station without that.

I will offer in evidence plaintiffs' Exhibit Number 30. [fol. 330] The Court: Sustain the objection.

Q. Mr. Mills, have you prepared this document I show you?

A. Yes, sir.

Q. What does that purport to represent?

A. Well, this is circular letter No. 3129 of August 16th from the Society to the Board of Directors and all representatives, and is a list of the so-called anti-ASCAP legislation introduced in various cities and states for the past few years.

Q. Was that list prepared under your supervision?

A. Yes, sir.

Q. Is it true and accurate?

A. Correct.

Mr. Frohlich: I would like to offer in evidence plaintiffs' Exhibit Number 31. For the purpose of saving time I would like to offer in evidence plaintiffs' Exhibit Number 31 for the purpose of showing that there has been a concerted plan on the part of the broadcasting industry throughout the country in the past few years to have legislation which would cut down or destroy the rights of the members of this Society.

Mr. Hotz: We object to that as incompetent and irrelevant to the issues here, and immaterial. The exhibit pro-[fol. 331] poses to give by different states the name of a bill, for example, introduced in a certain legislature. For instance, they say Daytona Beach Ordinance No. 622 introduced January 22, 1935 providing for \$2500 annual occupation tax, was enacted. St. Petersburg ordinance introduced the same as the two preceding, was not enacted. Now, it is so on down the list—Iowa House bill No. 289 following the Washington pattern introduced in 1937, was not enacted. Then it gives Missouri and Montana and Minnesota and so forth.

The Court: On what theory is that offer made?

Mr. Frohlich: This statute, as we say in our bill of complaint, affects the federal rights. We have rights under the Copyright Act, and those are affected by this statute, and it is the claim of these defendants, and must be their claim, and the only claim to justify the enactment of the statute which affects a federal right, and there must be some public interest involved, something which affects the safety and morals and health of the public, there must be some evil which necessitates the state coming in and doing this very drastic thing. It vests within the police power [fol. 332] of the state. The state has, in certain cases, a police power which it may exercise to correct some evil. I want to make as a part of my record, and I offer this document in evidence to show that there is not involved any evil in the State of Nebraska and no necessity for the exercise of this extraordinary police power; that the interests affected are private interests. This is a private feud between these broadcasting stations and the other users of music, a small group within the state, and the American Society, and that the great public interest of the state with its many thousands of citizens is not affected, and they have no rights here affected which should be curtailed or which in any way should be legislated by this bill. I think on the question of the police power of the State of Nebraska to enact a bill, and on the showing there is a private interest involved rather than a public interest, this is admissible.

The Court: Objection sustained.

Q. Did you, Mr. Mills, prepare an index of compositions which were in demand and in common use by broadcasters during the past few years?

A. Yes, sir.

Q. When did you commence the preparation of that index?

[fol. 333] A. I began laying the foundation for it many years ago—all of ten or fifteen years ago.

Q. Up to the present time have you completed that index?

A. No.

Q. About how many compositions have you recorded?

A. Some eighty-four thousand.

Q. Did you offer to furnish that index to any of the broadcasting stations in the United States?

A. I offered it to all of the broadcasting stations in the United States.

Q. Did you offer it upon the payment of any fee?

A. Offered it entirely free of charge.

Q. What did it cost the Society to compile this index?

A. We have spent approximately \$40,000 to date compiling it.

Q. That is \$40,000 to date.

A. Yes, sir.

Q. And it is still in the process of work?

A. We will continue to spend on it—it is a continuing thing.

Q. How many of these broadcasters accepted your invitation to furnish them with this index?

A. Some less than two hundred of them.

Q. Out of how many?

A. Six hundred odd.

Q. Will you please tell us just what this index contains?

A. This index is a list, title by title, showing the name [fol. 334] of the composer, the author and the publisher in each case, and the performing rights, affiliation, if any, of the copyright owner, by that meaning an indication who controls the performing rights of the particular composition, covering every composition broadcast by the stations which furnished ASCAP programs during the year 1935. Every composition copyrighted at Washington during the years 1936 and 1937, all of the compositions in the public domain of which we have any record or can ascertain any record, the names and addresses of all music publishers in the United States so far as we know them, and including the works of non-members of the American Society, the works of other societies doing business similar to the Amer-

ican Society, and works of members of the American Society, accurately listed, identified, checked and re-checked.

Q. How many did you say there were down to date?

A. Eighty-four thousand, it is my recollection—in the early eighty thousands.

Q. In this large box, does this contain the complete list of eighty-four thousand?

A. Yes, sir, if that is the ASCAP index—the first seven installments of it.

Mr. Frohlich: I would like to offer that box in evidence, your Honors, that large box over there (indicating).

The Court: If there is any objection to it, it will be sustained. [fol. 335]

Mr. Hotz: If your Honors please, I object to it as encumbering the record.

The Court: The witness has described this, and that is the only purpose, is it not?

Mr. Frohlich: May I offer in evidence a sample card?

The Court: Do you withdraw your other offer?

Mr. Frohlich: Withdraw the offer.

Mr. Hotz: There is no objection to the sample page.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 32.

Q. Will you explain why you have musilage or glue on the back of it?

A. The sheet is perforated, your Honors, and eight titles are printed on the one sheet; the title of the composition, the name of the composer and author, the year copyrighted and the name of the copyright owner and whether or not he is a member of the American Society or some other society or operates as an independent. It is printed so that these stickers can be torn apart and placed on a card of standard size in a card index cabinet. It is sent to the broadcasting people and it is the most economical method of filing these forms and so forth, the complete index to all the musical compositions currently being used by most of the broadcasting stations. [fol. 336]

Q. In conjunction with this index did you prepare this little document or catalog showing the filing system?

A. That is a description of the ASCAP index and how to install it and operate it, and the cost of installing it, and its usefulness to those stations.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 33.

Mr. Hotz: No objection.

Q. Now, Mr. Mills, from 1921 down, have the users of music campaigned or made efforts to free themselves of the necessity of paying royalties to the American Society, and to use music which was not controlled by the American Society?

A. Yes.

Mr. Hotz: Just a minute. I move to strike out the answer so that I may object to that.

The Witness: I beg your pardon.

The Court: It will be stricken out.

Mr. Hotz: Objected to as incompetent and irrelevant, the witness not having shown himself qualified to answer. He said the users of music. There are thousands and thousands of them. If you go into that, I will offer to show it was an impossible task as far as numbers were concerned in this state using this and paying license fees to you people, and never had any representation except through this legislation.

The Court: He may answer.

A. Yes.

Q. Do you know that of your own knowledge?

A. Yes.

Q. Did you in your conferences with the representatives of the picture theatre companies discuss the question of the picture theatres using music which didn't belong to the American Society?

A. Yes, sir.

Q. Did you have such a discussion with Mr. Cohen, president of the Motion Picture Exhibitors League?

A. Yes, sir.

Q. Did you have many discussions with him along that line?

A. Yes, sir.

Q. Did the motion picture trade organizations issue articles in the trade papers from time to time along that line?

A. Yes, sir.

Q. I show you this particular article taken from a publication called "Exhibitors Trade Review", Volume 10,

Number 11, August 13, 1921, and ask you whether you ever saw this article entitled, "No tax on this music"?

A. Yes, sir.

Mr. Frohlich: I will offer in evidence plaintiff's Exhibit Number 34.

Mr. Hotz: We object to that as incompetent and irrelevant. [fol. 338] It purports to be a sheet from a magazine conducted by one Norman Stuckey.

The Court: Objection sustained.

Mr. Frohlich: Your Honors, I have a number of other documents similar to this, all trade papers.

The Court: He has already testified what their efforts were, and the manner in which they attempted to bring that about is not at all material.

Q. Now, you have had a great deal of experience and you have testified with respect to music and the business of arranging the performing rights of American music?

A. Yes, sir.

Q. And that experience extends upwards of twenty years?

A. Yes, sir.

Q. You were in charge of the records of the Society for most of that period with regard to the copyrighting of music and the study of copyrights of musical compositions in Washington over the years, isn't that right?

A. Yes, sir.

Q. Have you from time to time attempted to compute the amount of music which is copyrighted each year in Washington?

A. Yes, sir.

Q. Have you any figures available on that subject?

A. Those that are issued by the Register of Copyrights in [fol. 339] his annual reports.

Q. How much music has been copyrighted each year?

Mr. Hotz: I object to that as not the best evidence.

The Court: It is showing the basis on which he bases his testimony.

Mr. Hotz: Those records are available, your Honors.

The Court: There is no lawsuit based on those records. You can cross-examine on them.

Q. About how many copies of musical compositions are copyrighted yearly in Washington?

A. Approximately twenty-five thousand.

Q. There are a great many copyrights that have gone into the public domain over the years?

A. Hundreds of thousands.

Q. As to those copyrights in the public domain, the American Society has no rights or connections with them?

A. Every citizen has equal rights when they are in the public domain.

Q. Have you ever been able to ascertain or obtain any information or figures with respect to how many copyrightable copyrights have been in or are now in the public domain?

A. No, sir.

Q. Is there any method obtaining information of that kind?

A. Not to my knowledge.

[fol. 340] Q. In addition to the copyrights that went into the public domain, is it not true a great many musical compositions have never even been copyrighted?

A. Tremendous numbers of them, particularly as to foreign compositions of foreign origin.

Q. There are many publishers, writers and composers in the United States who do not belong to the American Society?

A. A great many.

Q. Have you any information as to the number of publishers in the United States who do not belong to the American Society?

A. Well, there are five hundred odd active publishing firms in the United States; therefore approximately one hundred and ten belong to the American Society.

Q. And the remaining publishers do not belong to the Society, and publish music over which the American Society has no connection or control?

A. That is right.

Q. A great many writers and composers of music write and compose music which does not come into the repertoire or catalog of the American Society?

A. Thousands of them.

Q. Among the twenty-five thousand compositions copyrighted each year, what would you say represented the proportion of music controlled by the American Society?

A. Maybe three thousand of them.

Q. Three thousand out of the twenty-five thousand?

[fol. 341] A. Yes, sir.

Q. Did the radio broadcasters attempt to compile a catalog of musical compositions which was not within the control of the American Society?

A. Yes, sir.

Q. Can you briefly tell us what attempts they made?

A. The radio broadcasters made?

Q. Yes, sir.

A. Well, not under that general term, but the National Association of Broadcasters attempted to compile a library of so-called tax free music, that is, music not amenable to control as to public performance by the American Society or any other performing right society, and to make electrical transcriptions of those compositions with new, modernized, beautiful arrangements, and under the auspices of the National Association of Broadcasters such a library of transcribed tax free music was, in fact, created. To the best of my knowledge, at the conclusion of the supervision of the operation by the National Association of Broadcasters they had some one hundred and fifteen hours of such music in transcribed form which they had offered for sale to the broadcasting stations. The operation and the accumulation of master records and recordings was transferred from the National Association of Broadcasters to Langloise & Wentworth, Incorporated, of New York City. More recently the National Association of Broadcasters [fol. 342] has organized a corporation to be known as Broadcast Music, Incorporated, with the declared intention of—

Mr. Hotz: If your Honors please, this witness has not shown himself qualified. He is talking about an organization that he is not a member of.

The Court: He may testify to what the facts are.

Q. Please confine yourself to the facts. What did the National Association of Broadcasters do or the National Broadcasting Company do?

A. Announced its intention in the public press to organize a corporation to be known as Broadcast Music, Incorporated, and to put that corporation into the business of developing and exploiting a catalog of music, of which the then Broadcast Music, Incorporated, would be the copyright owner, and the intention was, and so stated in the public press, to make that catalog available for the use of broadcasters and to build it into a repertoire sufficient to enable the broadcasters to operate without access to the American Society license.

Q. Did the Langloise & Wentworth Company issue advertisements from time to time with respect to their catalog?

A. Yes, sir; and catalogs.

Q. I show you this advertisement and ask you whether this is a typical advertisement published by them in the [fol. 343] magazine entitled "Broadcasting"—by the way, is that a trade paper?

A. Official organ of the National Association of Broadcasters.

Q. You have read it for a great many years and are familiar with it?

A. Yes, sir; and I am acquainted with the editor.

Q. I will ask you if that was published therein?

A. In the 1938 yearbook.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 35.

Mr. Hotz: Where did you say you got this sheet from?

The Witness: From the 1938 yearbook issued by the Broadcasting. Official magazine or official organ of the National Association of Broadcasters.

Mr. Hotz: Your Honors, we object to this as nothing to show the witness is qualified to speak on this thing, except here is a sheet of paper with an advertisement called "Lang-Worth Leads" by the "Lang-Worth Feature Programs, Incorporated"—"every selection tax free".

The Court: He stated it came from the yearbook.

Mr. Hotz: He says it does. It says here, however, it comes from 420 Madison Avenue, New York, which is the Lang-[fol. 344] Worth Feature Programs, Incorporated. That is all there is to it. The rest of it you can't tell anything about it. I don't think it is competent, and along the same line as other advertisements and pages from magazines it is immaterial. Your Honors, there is nothing in there that helps a bit, and it encumbers the record.

Mr. Frohlich: The witness has testified the National Broadcasting Company has made an arrangement for this sort of catalog from the Langloise & Wentworth Company, and here is an advertisement issued by this company which speaks of "Every selection tax free."

The Court: Plaintiffs' Exhibit 35 may be admitted.

Q. That Langloise & Wentworth is a transcription service, isn't it?

A. Yes, sir.

Q. By that, what do you mean? Explain it to the Court.

A. Well, a transcription is another word for electrically recorded program of music on a phonograph record; a version of the phonograph record.

Q. That is broadcast by the broadcaster in place of the live musician singing or playing?

A. That is right.

Q. Today in the broadcasting industry do you know of [fol. 345] your knowledge what proportion of broadcasting is live talent and what proportion is by electrical transcription?

A. The question must be divided up in order to answer it. Some stations broadcast nothing but live talent, and some stations nothing but mechanical, and some stations a combination of the two. I wouldn't be prepared to hazard a guess as to the whole operation.

Q. Is it safe to say a great many of the stations use a considerable amount of electrical transcriptions?

A. All stations use a very great amount of them, except the principal stations. The more important stations do not—the key stations of the network.

Q. Those are located in large cities, aren't they?

A. Yes.

Q. Where live talent is available?

A. Yes.

Q. Take broadcasting stations in the small towns where live talent is not available, is there a great deal of electrical transcription broadcast?

A. Practically all of it except network programs and the crop and market and news reports and spot announcements and political speeches.

Q. Do you know which of the broadcasting stations in Nebraska subscribe to a transcription library service?

A. I think all of them do.

Q. Would it be fair to say all the stations in Nebraska at [fol. 346] some time or other during the day broadcast from electrical transcriptions?

A. Oh, yes, without exception.

Q. That form of broadcasting electrical transcriptions is, of course, a public performance for profit just as much as the singer or musician playing in the broadcasting room would be?

A. It is a rendition of the copyrighted music.

Q. If the author or composer or copyright proprietor is deprived of his performing right in the State of Nebraska on records, he is deprived from collecting any license from the broadcaster by reason of such transcription broadcasting, isn't that right?

A. That would be the result.

Q. Is there a catalog of any considerable quantity of copyrighted music owned by publishers who are not members of ASCAP which particularly offer their compositions to the broadcasters?

A. Yes, sir.

Q. Now, can you name one of those firms?

A. Davis & Schwegler of Los Angeles.

Q. What business are these gentlemen engaged in?

A. Printing and publishing.

Q. In what city?

A. Hollywood or Los Angeles.

Q. Mr. Davis was at one time attorney for the National [fol. 347] Association of Broadcasters?

A. Kenneth Davis was general attorney for and secretary of the Washington State Association of Broadcasters. I think he has never been associated directly with the National Association of Broadcasters.

Q. Merely with the State Association?

A. The Washington State Association.

Q. And is he now engaged in the publishing business in Los Angeles?

A. Yes, sir; he is a partner in the firm of Davis & Schwegler.

Q. Does he furnish his music to the broadcasting industry, do you know?

A. Yes, he does.

Q. He has circularized the industry and you have seen his circulars from time to time?

A. Yes, sir.

Q. It is possible, isn't it, Mr. Mills, for a broadcaster to conduct a station and play music without dipping into the repertoire of the American Society at all, isn't it?

A. It is very simple and very possible and very easy.

Q. With music in the public domain?

A. Yes, sir.

Q. Isn't it true some of the finest and sweetest music we have is found in the public domain?

A. All old masters and the classics are in the public [fol. 348] domain.

Q. And they may use as much as there is in the public domain?

A. Yes, and without a license.

Q. Isn't it true broadcasters also may, if they choose, refrain from using music of the American Society, and contract with other composers and publishers for their music and agree to use their music and pay them?

A. Yes.

Q. Now, do you know a broadcasting station in the United States that has ever gone around making contracts with musicians and copyright owners and composers for the public performance of their compositions in broadcasting?

A. Yes, sir.

Q. With whom have they made such contracts?

A. Many and varied individual composers, authors and publishers.

Q. As a matter of fact, there is another society which controls a great many European compositions and functions in the United States?

A. Yes, sir.

A. Do you know the name of that society?

A. The Society of European Stage Authors & Composers.

Q. Do they have an extensive catalog of compositions?

A. Yes, sir.

Q. Are there other associations similar in kind and scope?

A. Yes, sir.

[fol. 349] Q. Can you name it?

A. The Society of Jewish Composers and Authors.

Q. Do they have an extensive catalog and music?

A. I would not say an extensive one. Their catalog embraces practically all music used in Jewish religious services and rituals and folk songs.

Q. There are other associations of a similar nature in the United States?

A. Well, there are other listings and works available for the free use of broadcasters.

Q. What are those other listings, you say?

A. The Victor Talking Machine Company of Camden, New Jersey issues a special and very extensive catalog containing many thousands of titles which they have recorded and which are either in the public domain or copyrights of

which are owned by persons or corporations who grant the free use for performance of these compositions to broadcasters. The National Broadcasting Company and the Radio Corporation jointly have organized a service of electrical transcriptions which they call a thesoris, and have divided that into two sections, one section of music copyrighted by members of the American Society, and other section copyrighted by non-members or non-copyrighted, being available for free and unrestricted use by the broadcasters. There are similar listings by other phonograph manufacturers, all of them in special catalogs of the compositions of which they have made recordings, which are not amenable to American Society control with respect to performing rights.

Q. There are also many works written for radio performance that have never been copyrighted or published?

A. Thousands of them.

Q. And those, likewise, are available to radio broadcasters?

A. Yes, sir.

Q. Now, there are in evidence, Mr. Mills, photostatic copies of the contracts between the American Society and the foreign societies. I show you this document and ask you whether that represents a tabulation made by you or under your supervision?

A. It is a continuation of the tabulation originally made under my supervision, yes, sir.

Q. Does that represent the moneys received from and paid to the European societies for the years 1936, 1937, 1938 and 1939?

A. Yes, sir.

Q. Are those figures taken from your books in the regular course of business?

A. Yes, sir.

Q. Are they true and correct?

A. Yes, sir.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 36.

Mr. Hotz: No objection.

[fol. 351] Q. Now, the licenses issued by the Society to broadcasters and other users are in the nature of "blanket" licenses?

A. Yes, sir.

Q. What do you mean by "blanket"?

A. The licensee has a right to use as few or as many selections or whatever his desire from the repertoire represented by the American Society.

Q. Well, now, did the broadcasters at any time in their negotiations with you—

A. (Interrupting). May I add to my answer to the previous question?

Q. Yes.

A. Subject to an occasional restriction made for a particular reason upon the performance of specifically listed compositions.

Q. And on that question of restriction, what type of compositions are usually restricted by the publishers from radio broadcasters?

A. Compositions featured in musical comedies or other stage productions being currently staged on Broadway or any motion picture currently being presented.

Q. State the reason for that restriction.

A. Because in our experience and in the experience of the American Society if such compositions as are featured in musical comedies or motion pictures are not restricted from broadcasting, they will be broadcast so repetitiously and so constantly and over so many stations that they kill [fol. 352] the popularity of the songs and remove any desire that people might have to go to see the show in which that music is featured—they destroy the production of the picture.

Q. In order to protect the investment in the production of the motion picture, it is necessary to restrict indiscriminate wide broadcasting of certain popular music until the production has run its course, or the picture has run its course?

A. That is right; that is the sole reason for doing it. The restriction is not irrevocable. The Society grants special permission if and when applied for, for a certain number of those compositions from time to time so that the public may not be entirely deprived from hearing them, but it limits performance so that the major works cannot be destroyed by excessive broadcasting.

Q. From time to time in your negotiations with the broadcasters did they suggest any other form of license, that is, a form of license other than a blanket license?

A. In my negotiations from time to time with the National Association of Broadcasters there have been all sorts of suggestions made.

Q. Was the question of a per piece system brought out?

A. Yes.

Q. Was the question of a program system brought out?

A. Yes, sir.

[fol. 353] Q. Did any broadcasters say they wanted a per piece system?

A. Yes, sir.

Q. How was it made to operate?

A. It is not clear to anyone yet how it would operate. I don't know and they don't know.

Q. Under the per piece system they meant only to pay so much for a particular piece as and when used, is that generally the idea?

A. I will give you my conception.

The Court: It is immaterial.

Q. Under the program system, what was the suggestion?

A. The suggestion was that the broadcaster should pay fees in respect only to the music copyrighted by the members of ASCAP.

Q. If that program were put into effect, how would it work out as a practical proposition?

A. It would probably triple the broadcaster's cost for rendering programs for music service for the clerical cost that would be incident to preparing the program reports. It would triple our costs and split up the money and divide it—it would be an accounting burden.

Q. The Society would have to keep track of each program?

A. The broadcaster—the Society would have to receive from each broadcaster a complete and detailed accurate log of the music used on each and every program.

Q. Wouldn't it have to check up on that log?

[fol. 354] A. It would have to break-down and audit the stations and credit it to the proper composers and authors—thousands of blunders would occur.

Q. Would that entail a large substantial cost?

A. A tremendous cost.

Q. Is that cost saved in the system of blanket licensing?

A. Yes, sir.

Q. In your opinion is the blanket license the best form of license given to any user of music?

A. It is the cheapest and most economical, and gives the most service to the public and author.

Q. Does the Society indemnify the users against claims of infringement?

A. Yes, sir.

Q. Have claims of infringement been made from time to time against the users, particularly the broadcasters?

A. Yes, sir.

Q. Has the Society defended suits at its own expense?

A. Yes, sir, and saved and held them harmless in any case.

Q. No single broadcaster or user in the United States who had a license from the American Society since 1914 that has ever been compelled to pay a five cent piece to any third party on a claim of infringement?

A. There have been none. We have made payments in their behalf.

Q. In your opinion could a broadcaster operate economic- [fol. 355] ally on any but a program license system?

Mr. Hotz: I object to that as not the best evidence, and hearsay, the witness not having shown himself competent; he has never run a broadcasting station.

The Court: Objection sustained.

Q. Just what is spot broadcasting?

A. It relates to those programs—spot broadcasting is a term used by advertising agencies relating to the purchase of idle time in spots and localities where it may be available in filling that time in with a transcribed program or electrical transcription making an announcement of some sort.

Mr. Hotz: By electrical transcription you mean a disc?

The Witness: A phonograph record; the broadcasters named it "electrical".

Mr. Hotz: Put on a machine and played in the broadcasting room?

The Witness: It plays in the same manner and routine, and is an apparatus such as an ordinary commercial phonograph record, except it is larger and has a different timing as to revolutions per minute at which it revolves, and has a different cutting on its surface for the purpose of recording

its music, but for the layman it is just the same thing as a [fol. 356] phonograph record.

Q. For this spot broadcasting these broadcasters charge rather substantial rates, don't they?

A. Yes, sir. I am differentiating as between spot broadcasting and spot announcing. Are we talking about the same thing?

Q. I am talking about spot announcing.

A. That is different. The spot announcement is time sold by a broadcaster between musical programs for a brief announcement, generally not exceeding three minutes, and usually one hundred words or less.

Q. For that advertiser who wants his product announced, he pays a substantial rate to the studio?

A. Yes, sir.

Q. That spot announcement is usually preceded by a radio program?

A. A typical program is at 6:30 P. M. by the Ben Russ Watch that always follows and precedes a musical program.

Mr. Frohlich: That is all.

(Whereupon an adjournment was taken until 9:30 o'clock A. M., Tuesday, September 19, 1939).

[fol. 357] (At 9:30 o'clock A. M., Tuesday, September 19, 1939, Court convened pursuant to adjournment, all parties present as heretofore, and the following proceedings were had, done and entered of record, to-wit:)

EDWIN CLAUDE MILLS, a witness on behalf of the complainants, on the stand at adjournment of Court, was recalled to the stand for further examination, as follows:

Cross-examination.

By Mr. Hotz:

Q. Mr. Mills, who are the following: "Harms, Inc.", "T. B. Harms Co.", "M. Witmark & Sons", "Remick Music Corp.", "New World Music Corp.", "Victoria Publishing Co.", and "Schubert Publishing Co."?

A. They are all music publishers.

Q. Of New York?

A. Yes, sir.

Q. And those seven were exempted by notification from your company, were they not, that they did not belong to ASCAP any more after December 31, 1935?

A. Well, I don't understand the meaning of the term "exempted". Oh, yes, they did not belong—their memberships terminated.

[fol. 358] Q. They had been members prior to that time?

A. That is right.

Q. Are they large concerns?

A. Some of the large firms and concerns.

Q. What connection did Warner Bros. have with those seven?

A. It is my belief and understanding Warner Bros. are the owners of the capital stock of those separate corporations.

Q. And they withdrew from the American Society on December 31, 1935?

A. They did not renew their then membership.

Q. Are they now back in the association?

A. Yes, sir.

Q. When did they come back in?

A. Well, more or less about July of the following year, I would say.

Q. July of 1936?

A. Yes.

Q. In your showing here in one of the affidavits that was filed is was stated that the consideration in connection with the transaction between Warner Bros. and the withdrawal was eleven million dollars. Do you know anything about that?

A. The consideration was eleven million dollars?

Q. Yes, that is the consideration that Warner Bros. paid in connection with those seven companies.

A. To ASCAP?

Q. Not to ASCAP, but to these companies.

[fol. 359] A. You mean consideration paid to these companies for the purchase of their stock?

Q. Yes.

A. I have no knowledge of that.

Q. Now, could you give us any idea as an officer and director of this American Society, the amount of money that was paid to these seven companies as publisher members of your organization last year?

A. No, but there will be a subsequent witness who will be perfectly competent to testify on that. I wouldn't want to guess on it.

Q. When they came back into the American Society in 1936, what large companies were left out of ASCAP then as publisher members?

A. Of this group?

Q. Of the whole group, of the list of members published by you and introduced in evidence, which says, "List of Publisher Members"?

A. The question then is, what large publishers from among that list—

Q. No; what large publishers in the United States are not members of ASCAP, publisher members of ASCAP?

A. The M. M. Cole Publishing Company of Chicago, Arthur P. Schmidt of Boston, Associated Music Publishers of New York City, and Bright, Coff & Hartel.

Q. Davis & Schwertley of Los Angeles?

[fol. 360] A. Yes, sir.

Q. Who else?

A. Well, I would have to have the list from which to refresh my mind.

Q. Have you got such a list?

A. Not with me, no.

Q. Do you know where you could get one?

A. Yes.

Q. Could you before you leave get us such a list?

A. I am planning on leaving here this afternoon. No.

Q. When you gave the list of publisher members of ASCAP at one hundred and ten, I believe you stated—your pleadings show one hundred and twenty-three—did that take in the subsidiaries? For instance, I will call your attention—

A. The answer is no—you don't need to call my attention to anything.

Q. For instance, Edward B. Marks Music Corporation has twenty-eight subsidiaries.

A. No, those are not subsidiaries.

Q. What are they?

A. They are not operated as separate companies; merely titles of corporations, owners in some cases of a very few songs, which songs have been absorbed into the catalog of the Edward B. Marks Music Corporation. The companies are not operated as subsidiaries.

Q. But your Exhibit Number 5, as well as your Exhibit [fol. 361] Number 4, both list the names of the one hundred and twenty-three publishers, and then underneath the names of the one hundred and twenty-three publishers are all these other organizations, is that right?

A. We list in bold type the names of the firms that are members of the American Society. Under the names listed in bold type are names listed in italics. Those represent the titles of very small publishers owning a few compositions that from time to time they have sold to the principals whose names are listed in the bold type. Those firms no longer operate and do not operate as subsidiaries of these principal concerns. The purpose of printing the names here is to notify the users of music that these are the names which appear as the copyright owners upon the music published by these firms before their catalogs were purchased by the principal firms.

Q. But in all of the instances of those companies who are companies listed in the fore part of Exhibits Numbers 4 and 5, your company has the public performance right?

A. The American Society is not a company, but it has the performance right.

Q. That is, the public performance right?

A. Right.

Q. The same as they do, as those listed in bold type?

A. Yes, sir.

Q. Are you able to estimate or do you have any figures [fol. 362] from which you can tell me the amount of the vocal and instrumental musical compositions that are copyrighted that are owned by the publisher members and these other companies listed in the fore part of Exhibits Numbers 5 and 5?

A. The total number of copyrighted compositions presently embraced in the American Society?

Q. Yes.

A. That would be a guess.

Q. You stated yesterday that you had a box of evidence here, and you have introduced some, is that correct?

A. Eighty-four thousand.

Q. And that isn't complete?

A. Nor is it confined to the compositions controlled by the American Society.

Q. It doesn't even purport to represent an accurate list?

A. It is a list of the titles embraced.

Q. But it contains other things besides pieces of music, vocal and instrumental music, the public performance rights of which are vested in the American Society, is that right?

A. Yes.

Q. And it has taken you a considerable length of time to work that out, hasn't it?

A. Years.

Q. Has anybody else tried to work it out, any user of music? They would have the same difficulty you have had in connection with it, would they not?

[fol. 363] A. Unless they were more skillful than we have been.

Q. So that you want to conclude here in this regard in your testimony that the American Society does not have any accurate list of the copyrighted vocal and instrumental music of which they control or own the public performance rights?

A. We own the public performance right in respect of every composition, the copyright of which is controlled by a member of ASCAP. A copyright notice is printed on every sheet of music and every orchestration published, and anyone who comes into possession of one so published and from which a performance is rendered, may know whether or not they have the right to perform it by looking at the name of who composed it, and whether he has membership in ASCAP, and, if available, we can distribute it to interested persons. By comparison of those items, any user of music may quickly ascertain whether or not he has a license to publicly perform it. His is the simple problem. Ours is the difficult problem.

Q. If anyone were to get a complete list, they would have to go through the same mechanization as you have, in order to arrive or attempt to arrive at an accurate list?

A. In order to produce the same list, they would have to exercise the same effort.

Q. This office that is maintained by the American Society in New York, just generally how expensive is it and how [fol. 364] big an office is it, in space?

A. It occupies about seventy-five per cent of the forty-fifth floor of the building at Rockefeller Plaza, known as the R. C. A. building in Radio City, New York.

Q. Approximately what rent do you pay for that space?

A. Around \$30,000 a year, in round figures.

Q. Yesterday, Mr. Buck, when he was on the stand, made the statement that the networks, the National Broadcasting Company, Columbia and Mutual, and others, paid ASCAP. Now, Mr. Mills, I want to straighten that out through you, if I can. The network as such doesn't pay ASCAP any fee, does it, for public performance right?

A. The National Broadcasting Company strictly and technically—that would not be the case, that the networks paid as a network, by the networks broadcasting people, in respect of each of the broadcasting elements—

Q. Let us get down to brass tacks. Unless the National Broadcasting Company or the Columbia Broadcasting Company own individually and personally as such a broadcasting station somewhere, they do not pay to ASCAP any public performance license fee?

A. In respect of stations which they do not own or operate?

Q. Yes, sir.

A. No.

Q. Do you know how many stations the National Broadcasting Company own and operate, of their own?

[fol. 365] A. About eleven stations.

Q. And yet the National Broadcasting Company serves throughout the country a large number of local broadcasting stations, including some in the State of Nebraska?

A. The chain programs, yes.

Q. So that for any music that emanates in New York from the National Broadcasting Company station, and which serves, for example, WOW in the State of Nebraska, there are no public performance rights paid to your society by the National Broadcasting Company in New York?

A. No.

Q. That is true with Columbia?

A. Yes.

Q. That is also true with the Mutual?

A. Yes, sir. It is true of all of them; it is the universal practice.

Q. How many networks are there?

A. As networks, probably fifteen or eighteen.

Q. That is true with all of them?

A. Yes. Each station pays its own fees.

Q. Going back a moment to the publisher members that own copyrights of vocal and instrumental music, the public performance rights of which are vested in your Society,

would you be able to tell us, or do you have any records to show the proportion that that music bears to the total number of publishers that have copyrights in the United [fol. 366] States?

A. I will have to ask you to repeat the question.

Q. What I am trying to get at is the copyrights that are owned and controlled by your publisher members.

A. By the whole group?

Q. The whole group.

A. Yes.

Q. What would that bear to the sum total of the copyrighted music by all the publishers in the United States, including those that are not members of your Society?

A. That again has to be a guess.

Q. What I am trying to get at is, what is the percentage?

A. We would like to get at it. Everybody I know who is interested in this subject would like to get at it.

Q. You can't tell?

A. I can guess.

Q. Give us your guess.

Mr. Frohlich: I object to that.

The Court: He can make an estimate.

Q. You have charge of this thing for your company, do you not?

A. I have had.

Q. You sit right there all the time?

A. I do—I don't sit all the time, but I am there.

Q. You know these various houses publish their catalogs of the amount of music they own?

A. They don't all publish catalogs.

[fol. 367] Q. Some have typewritten memoranda, but all have some list of music they have for sale, do they not?

A. They do.

Q. You are interested in all of those, because you have the public performance rights?

A. Yes, sir.

Q. As a matter of fact, they are filed in your organization, are they not, in your Society?

A. Of recent years they have been filing the card on all the new compositions that they have published.

Q. Now, those organizations that are not members of your Society, I suppose you have had some correspondence with them to get them in your Society, have you not?

A. In our history we have never solicited a member.

Q. Not anybody?

A. Never.

Q. Not a publisher member?

A. Never a publisher or composer. Every member of ASCAP makes a voluntary application for membership in the organization; there is no exception.

Q. These seven members of Warner Bros., how did they get back in?

A. Applied for re-entry.

Q. Were there any negotiations in that regard between yourself and them?

A. Once.

[fol. 368] Q. The result is they came back under certain conditions into the American Society?

A. They came back under no conditions whatever. They applied for re-election to ASCAP.

Q. As a matter of fact, Mr. Mills, isn't it true from the knowledge you have of this situation, that the copyrighted music that is owned by these publisher members and their subsidiaries constitutes the largest part of the commercially usable copyrighted vocal and instrumental music in the United States?

A. I think so, but no more important—put it at a given time.

Q. I say at the present time.

A. In respect of a given program or construction of a particular musical event or entertainment, at that time any composition, and one particularly fitting the mood and atmosphere and needs and necessity of the program, that would make a well-balanced and diversified entertainment to meet the needs of that particular enterprise, one composition is just as important as another, regardless who owns it.

Q. In connection with the users of your music in the State of Nebraska, the larger users of it, such as the broadcasting stations and hotels?

A. The hotels are not among the larger users. They are minor users—there are three hotels in the State of Nebraska that use music.

[fol. 369] Q. Which are they?

A. The Fontenelle.

Q. The Paxton?

A. The Paxton is not presently using music. I don't believe. I heard none when I was there the other day.

Q. Mr. Blazer would know more about that?

A. Much more.

Q. He knows which ones are, and which ones are not?

A. Yes, sir.

Q. Do you know of any companies that broadcast that could operate or run a musical program without the use of your music on which you own and control the public performance rights?

A. Yes, I assume they all could. Why not?

Q. For example, take WOW, do you say they could run and operate with the arrangements they have, without using the American Society music?

A. They certainly could; they have never tried.

Q. They couldn't try, you know that as a matter of fact?

A. I do not know it as a matter of fact. I know quite the reverse. If they would exercise the same ingenuity and efforts and persistence in attempting that, as they do in attempting to destroy the protective organization of these composers, they might discover what I say is entirely true, that they could get along well without the American Society repertoire, and they are now declaring their intention to [fol. 370] do that through their national organization.

Q. Yet the list of publishers; members of your Society, contains substantially all, or a large part at least, of the vocal and instrumental copyrighted music in the United States?

A. I conceded previously in my testimony a large part of it, a very large part, an important part, a very important part.

Q. The publisher members, as well as your organization, are consistently keeping up their efforts to acquire the public performance rights of music?

A. I repeat we have never solicited a member. We are, however, anxious that our members shall produce as much music, good music, as possible for the better service of our clients, our licensees and the public. We want them to produce music.

Q. It is increasing right along, is it not?

A. It must increase, because radio destroys it so rapidly.

Q. I mean by that the public performance rights your Society now owns and controls, is on the increase. It is not going down any?

A. In the sense of the number of compositions and repertoire, it increases, yes, but as many die as are born. A new

song is created, and an old song goes out. There is just that constant flow of material. Of the old songs, a few remain alive in the public affections, but most of them die. [fol. 371] Songs are created now much more rapidly than heretofore; because the songs die much more quickly, and a writer must write more songs to keep himself off the breadline, than he used to have to do.

Q. Referring to plaintiffs' Exhibits Numbers 17 and 18, it shows here that in 1938, on Exhibit Number 17, there was \$68,789.54 as a total from all sources collected by you in the State of Nebraska, and that against that was an expense item of—

A. (Interrupting): Whatever it is, if it is accurate, I will concede it.

Q. We will take 1937. In 1937 the gross receipts were \$54,474.64 in the State of Nebraska, and the total expense was \$11,890.41 according to Exhibit Number 18.

A. About a sixth of the income.

Q. I mean it was \$11,379.03.

A. The income was how much?

Q. The income was \$54,474.64.

A. About twenty per cent. Of that, you understand, don't you, as to the amounts received from broadcasting stations for each nickel received by the American Society, the broadcasting station received one dollar from the advertiser.

Mr. Hotz: I move to strike that out as not responsive to any question.

The Court: It may be stricken out.

Q. Then was this expense item here just shown of [fol. 372] \$11,379.03 in Nebraska?

The Court: What exhibit is that?

Q. Referring to Exhibit Number 18, was that the expense here in the State of Nebraska for making these collections?

A. May I see the exhibit?

Q. Yes.

A. Is this one of our exhibits?

Q. Yes.

A. Which is the year you are reading?

Q. 1937, because 1938 was not down to date.

A. That is correct. The answer to this question is yes.

Q. That that was the Nebraska expense?

A. That is right, legal and otherwise, all expense.

Q. In Nebraska?

A. Yes.

Q. Then the net amount that went to the American Society for the year 1937 was \$54,474.64, less \$11,379.03?

A. That would be correct, yes, sir.

Q. And I think Mr. Buck testified it cost about eighteen per cent to operate. I would assume he meant "operate"?

A. The National organization—the complete operation. Our expenses vary between eighteen and twenty-three per cent. Presently it is a little higher because of all of this litigation.

Q. Would you or Mr. Paine know more about just generally what amounts of money were paid out to some of your [fol. 373] publisher members?

A. Mr. Paine.

Q. You can't give it?

A. No, sir.

Q. Who is the biggest one, for example, Irving Berlin, Inc. or Harms?

A. The largest one? Either Harms or Berlin would probably be the highest.

Q. What is that, about how much per year?

A. My guess is about eighty or ninety thousand dollars a year. It fluctuates according to the number and performance which they have on the programs which we analyze by the publishers ratings.

Q. The publisher, Irving Berlin, has a catalog of vocal and instrumental music?

A. Yes, sir.

Q. That it published?

A. That is right.

Q. And which you have on file in your office?

A. Not in its entirety, perhaps.

Q. Are they classified in the membership the same as the others?

A. The same. They are classified, in general, the same way, but entering into their classification are various elements, their seniority in the organization.

Q. I am not asking about what enters into it. I am asking you if there are classifications for your publisher members?

[fol. 374] The answer is yes.

Q. And tell us what those classifications are as briefly as you can, and give us the amount paid to each classification.

A. They are classified under three headings, first, under the heading which relates to their seniority in the Society, in which a number of points are credited.

Q. How many are?

Mr. Frohlich: I object to that.

(No ruling).

A. They are all in it, in that classification.

Q. How many publisher members are in your first classification?

A. As many as have been in the Society the longest period of time.

Q. How many are there?

A. One.

Q. And who is it?

A. The one who came into the Society first.

Q. Who is it now?

A. I don't know. The membership record will show who ever came into the Society first.

Q. Whoever came into the Society first?

A. Whichever publisher rates Number 1 as to seniority has the highest seniority classification, and the most recent one, the lowest.

Q. What does he get, that one that is in there the highest?

A. Well, now, I am going to tell you, solemnly tell you. [fol. 375] Each publisher—

Q. (Interrupting): Answer the question: How much does he get?

Mr. Frohlich: I object to the question.

The Court: This witness is not attempting to be unfair; let him answer the question in his own way.

A. (Continuing): Each publisher receives a point of credit under the seniority heading for each quarter, that is to say, each three months that he has been a member of the Society. The total number of points accredited to all of the publishers under that heading are computed, and then each publisher receives a share in the seniority fund, so-called, according as the number of points accredited to

him are computed as a percentage of the total number of points of all publishers. If that percentage is six, he receives six per cent of the royalties distributed under the seniority heading. When the total amount of royalty available for distribution to the publisher members has been ascertained, that sum is divided into three parts, one to be divided under the seniority heading, and one under what we call the "availability rating", and one according to performance credits. The seniority ratings I have just described to you, I hope freely; if not, I will be glad to go into such details as you want me to. The availability rating is based upon the so-called availability value of the catalog of the participating publisher. These catalogs are rated [fol. 376] as to their availability by the committee of the publisher members, and those ratings are covered by the vogue and popularity of the catalog as a whole, the prestige of the publisher and the scope and extent and method and quality of the works in the catalog. It does not relate to the number of works in the catalog, because one work may be greatly used in public performances, and another work not at all. Therefore, the availability value of the work greatly used is much more than such value of the work that is seldom used. Those ratings are fixed for the publishers by points. Each publisher, and publisher by publisher, is studied as to his catalog. These publishers who constitute the committee make a study and are skilled in the business, and all of them are veterans of the music publishing business as a matter of general practical trade knowledge, and know, for example, what is in the magazine of Harms.

Mr. Hotz: I think he has gone far enough.

The Court: I think he has gone far enough.

The Witness: I will try to answer the question.

Q. Tell me the amount of that first classification of which there is one member?

A. Twenty per cent of the amount available for distribution is divided among them.

Q. Twenty per cent of the amount available for distribution?

A. Is divided under the seniority heading. Thirty per [fol. 377] cent under the availability heading, and fifty per cent according to the program credits.

Q. Will you add those all together and tell us how much

you are paying for your first classification at the present in dollars and cents?

A. I would say about eighty thousand dollars a year.

Q. How many other classifications are there besides Number 1?

A. Well, there are all sorts. They are not in definite classes like writers.

Q. They take that scale, twenty per cent, thirty per cent, and fifty per cent, and use that and apply it as spread out by the committee over your publisher members?

A. Three separate sums, twenty, thirty and fifty per cent, apportioned among the entire publisher members according to their participation. The sum total the leading publisher received from his participation in those three funds added up at the end of the year, I would guess at the moment, about eighty thousand dollars a year. It may have been increased since I saw the report.

Q. What is the least amount paid at the present time in dollars and cents to a publisher member of your Society?

A. Will you let Mr. Paine testify on that question? He can testify exactly; I can't. I haven't been in touch with that for a couple of years.

Q. In connection with these contracts that have been introduced as Exhibit Number 16, being some three hundred [fol. 378] and ninety-one to four hundred, you talk about negotiations that were had with your Society in reference to the amounts that these users of music should pay. Now, I am going to hand you this list of exhibits, Number 16, and have you pick out, if you can, which ones of those contracts were arrived at by negotiations with your organization in New York.

Mr. Frohlich: I object to that as incompetent, irrelevant and immaterial. The contracts speak for themselves.

The Court: He may answer, if he knows.

A. I can't answer; I don't know. I have never personally handled them before, or seen them before.

Q. You, of course, are located in New York and confine your attentions to the New York office?

A. Yes, sir, and supervision of the field in previous years.

Q. When you told Mr. Frohlich yesterday in your examination and made reference to negotiations, just what did

you have reference to? Whom were you referring to as the other party to the negotiation?

A. In the various cases.

Q. In connection with the broadcasters.

A. That National Association of Broadcasters.

Q. You did not have any direct negotiations with the ten or eleven stations in the State of Nebraska; they didn't have any personal representatives there as such, did they?

A. Oh, I think they did.

[fol. 379] Q. For example, whom?

A. Well, at the moment I say I think they did, but I can't recall. The negotiations were years ago. If they had no representatives there personally, they had authorized representatives act for them and their association.

Q. How do you know that?

A. I suppose the National Association of Broadcasters when they represent the broadcasters of the United States of America, I assume they do.

Q. How about the hotel men?

A. The American Hotel Association.

Q. You didn't have any direct negotiation with any hotel men?

A. On the contrary, I did have. I didn't have direct negotiation, but negotiations with their agents. They are all members of the association—the Nebraska hotels are all members of the American Hotel Association.

Q. But there were no members from the respective hotels, users of your music, in the State of Nebraska, that appeared there to negotiate, is that right?

A. Not personally, no.

Q. And as far as the dance halls and other users covered by the contracts in Exhibit Number 16, that likewise is true, there was no one appeared there to negotiate?

A. They negotiated with our representative.

Q. Here in the State of Nebraska?

A. Yes, sir.

[fol. 380] Mr. Hotz: Mr. Bennett wanted to ask the witness some questions, and Mr. Frohlich said he didn't have any objections if the Court didn't.

The Witness: Has the witness any voice in the matter?

Mr. Hotz: I don't think so.

The Witness: I want to know who Mr. Bennett represents.

Mr. Hotz: I think I can state that. Mr. Andrew Bennett is counsel for the National Broadcasters Association of New York, and has been for a considerable length of time.

Mr. Bennett: I am not representing the National Broadcasters here.

Mr. Hotz: Mr. Bennett has also had a vast amount of experience in connection with the copyright law by virtue of his previous connection with the Department of Justice.

The Court: Is he representing somebody here?

Mr. Hotz: At the present time he is not representing in this action either one of those parties that I have just mentioned.

The Court: Is he representing anybody?

Mr. Hotz: He is representing and has appeared here as counsel for Mr. Grosshaus, party defendant to this case, [fol. 381] and is the president of the State Association of County Attorneys. I want to give Mr. Mills the benefit of that situation.

Cross-examination.

By Mr. Bennett:

Q. Mr. Mills, just two or three things in your direct examination I think we might clear up. You recall that on direct examination you testified that a publication known as the "Broadcasting Magazine" and a yearbook was the official publication of the National Association of Broadcasters?

A. No; I testified that it was the official organ.

Q. The official organ?

A. Yes, sir.

Q. As the consequence of that, the Court admitted an exhibit which I think the Court normally would have excluded in line with the exclusions of others. I have here a publication entitled "Broadcasting Year Book" for the year 1939, and also "Broadcasting Magazine". Will you look on Page 42 at the publication notice and note the name of the publisher?

A. It states it is the official organ of the National Association of Broadcasters, and I hope my counsel puts you on the stand and makes you think it isn't.

Q. Are you familiar with the publication known as the "N. A. B. Reports" published each Thursday and Friday morning?

A. They are confidential and distributed to broadcasters [fol. 382] only.

Q. One copy of that goes to the American Society, does it not?

A. No.

Q. You still think that is the official organ?

A. I still think, maintain and insist that is the official organ of the National Association of Broadcasters.

Q. Is it your contention the National Association of Broadcasters has any interest in this publication at all?

Mr. Frohlich: I object to this line of testimony.

(No ruling).

A. I don't think any financial interest.

Q. I think the Court has a misconception of the "Broadcasting Magazine".

A. It is the official organ of the National Association of Broadcasters, and the mouthpiece for the radio industry.

Q. Have you personal knowledge of that, or are you assuming it?

A. I have personal knowledge of it.

Q. Will you state the means of your personal knowledge?

A. You don't want me to.

Q. Yes, I do.

A. Well, in deference of the people for whom you are speaking, I won't answer that question unless the Court compels me to.

Q. Do you know the owner of the "Broadcasting Magazine"?

A. Pretty well.

[fol. 383] Q. Who owns it?

A. The publisher's name must be printed at the masthead there.

Q. It is.

A. Well, let me see it. It is—

The Court: It is immaterial.

Mr. Bennett: I confess it is immaterial.

The Witness: It is owned by "Broadcasting Publications, Inc."

Q. There are half a dozen magazines devoted to the radio broadcasting industry in which the association has no connection at all and no control or nothing.

The Court: You are not testifying.

Mr. Bennett: I am trying to explain, your Honors.

Q. Do you want to change your testimony that this is the official organ?

A. No, I don't want to change my testimony. I don't see why I am asked these questions.

Mr. Bennett: You testified to it on your direct examination, Mr. Mills.

Q. Mr. Mills, you stated that you conducted negotiations with various users of music, and outlined very much in detail the various negotiations. You stated that in 1934 you conducted negotiations with the motion picture theatres. Do you recall with whom you discussed the motion picture [fol. 384] situation?

A. Yes, with Walter Vincent as chairman of the committee appointed by the motion picture theatre owners of America.

Q. Who were the other members of that committee?

A. I don't recall—somebody from Paramount and Fox.

Q. May I refresh your recollection—

The Court: What difference does it make?

Mr. Bennett: I think the whole story is most important to the issues.

The Court: Any objection?

Mr. Frohlich: I object to this line of testimony.

The Court: Sustained.

Q. When was the first meeting you had with the representatives of the motion picture industry and who was present?

A. The first meeting would have been in about the latter part or about the middle of 1921.

Q. I am talking about 1934 in these negotiations.

A. You asked me when the first meeting was held. The first meeting was held in 1934.

Q. The 1934 negotiations?

A. The first meeting was in 1934—I do not recall when it was held.

Q. You do recall it was about the middle of July?

A. That is as good a date as any—I will concede about that.

[fol. 385] Q. Do you recall the reason for holding that meeting?

A. An announcement of an intention on our part to increase the rates charged for licenses.

Q. What was the substance of that announcement?

A. I don't remember.

Q. May I refresh your recollection on that?

A. You have my permission, yes, sir.

Q. Do you recall you sent out the first part of July notices to a number of theatre operators that and after October 1st the fees of each motion picture theatre would be increased to a sum equal to one complete sell-out of the house at the highest price charged at any time during the year?

A. No such letter was ever sent out; no such announcement was ever made.

Q. Are you sure of that?

A. I am positive.

Q. Do you recall at the meeting in July—

Mr. Frohlich: Just a moment. Have you such a letter in your possession? Will you offer it in evidence?

Mr. Bennett: I called for such a letter on deposition, the interrogatories requested the letter. I do not have such letter in my possession.

The witness: It was a forgery if you have it. There [fol. 386] never was such a letter.

Q. I had what purported to be such a letter.

A. So that I may not thought to be evasive, I suggested and proposed on ASCAP's behalf that there should be a new rate, and requested the motion picture industry to appoint a committee and confer with us upon it, and negotiate with that as a basis, and that is what was done, but you never had any letter announcing that from such a date that would be the rate.

Q. Was that formula discussed at the meeting in July with Mr. Vincent and other members of the committee?

A. Yes.

Q. Did those members of the committee call your attention to the fact that that amounted to an increase in many instances of eleven hundred per cent?

A. Yes, and upon further discussion it was disclosed the increase would be so great because many theatres and theatres in respect to which the increase particularly would

have been so great, had falsely reported to us in previous years the number of seats in their theatres and paid us fees, for example, on seven hundred seats on their statement, and said that was all they had, when, as a matter of fact, they had sixteen hundred, eighteen hundred and two thousand seats, and when we sent the investigators to count the seats we found there had been dishonest reports.

Q. You have answered the question.

[fol. 387] A. The increase would have been eleven hundred per cent or fifteen hundred per cent or what have you in regard to such theatres.

Q. Did you not insist at that meeting in July that no reductions from that formula could be made?

Mr. Te Poel: Objected to as irrelevant.

(No ruling).

A. I endeavored to get as much increase for my people as I could get.

Q. And the formula—

The Court: It is in evidence that there was an attempt to get an increase. Does it make any difference what the details of that effort were?

Mr. Bennett: Your Honors, I think there has been so much irrelevant material put in here so far as the issues are concerned. For the benefit of the Court, they should know the entire history that took place in these various meetings.

The Court: Because some irrelevant matter went in, you think we ought to have some more irrelevant matter in the record?

Mr. Bennett: When the irrelevant matter has gone in, it should be cleared up so that the Court may know the entire history.

The Court: The Court doesn't think this clears up anything.

[fol. 388] Q. Was anything done, Mr. Mills, toward reaching an agreement at that meeting in July?

A. Yes, a formula was negotiated.

Q. Did the theatre operators agree to it?

A. The committee did on behalf of the theatre operators.

Q. At that meeting in July?

A. It may not have been culminated then, but there were a series of conferences, six or seven or eight in all, and as a

result of this series of conferences a formula was agreed on, and an increase in rates granted by the motion picture interests.

Q. When was the final formula agreed on?

A. If you say the meeting started in July, I would say in August or September.

Q. Don't you recall the next meeting after that? The next meeting with the committee was September 25th.

A. I concede it, yes, if you say it—I don't recall it.

Q. Do you recall who was present at that meeting?

A. No. I presume Walter Vincent, O'Toole, Comerford and the usual crowd.

Q. Do you recall what took place at that meeting?

Mr. Frohlich: I object, your Honors, to any further testimony along these lines.

The Court: Objection sustained.

Q. Will you state when the last meeting took place, Mr. Mills?

A. With the committee representing the Exhibitors? [fol. 389] Q. Yes.

A. That would have been the last meeting, the meeting at which the agreement was culminated.

Q. It was culminated September 25th?

A. I don't know if that was the exact date, but if it is a date that pleases you, it is agreeable to me.

Q. It isn't a question of pleasing me.

A. I don't remember. I hate to use that phrase here—"I don't remember". I like to remember things.

Q. You have been pretty clear on many other things. Like most of your testimony, your memory has been pretty clear.

A. Give me leave to come back to the stand, and if the Court will excuse me to go to the long distance phone, I will phone the office in New York and find out if the date was September 25th, if that is important.

Q. May I refresh your recollection on the dates?

A. Yes.

Mr. Frohlich: If the Court please, I object again to this line of testimony on the ground it is entirely irrelevant and immaterial.

The Court: Objection sustained.

Q. What was the final formula that you suggested to the motion picture operators?

A. I testified to it yesterday.

Q. Do you have any objection to repeating it?

The Court: Is there any issue or question about it?

[fol. 390] Mr. Bennett: I don't think so.

Mr. Frohlich: I object to it then as no dispute or question.

The Court: We don't want to listen to testimony because it is true.

Mr. Bennett: Withdraw the question.

Q. Mr. Mills, on your direct examination you referred to a meeting in Exhibit Number 22 with certain representatives of the broadcasting industry, I believe you mentioned them, with the Department of Commerce and various other individuals. Did you bring with you a copy of the stenographic notes of that meeting?

Mr. Frohlich: As a matter of fact, I think a copy of the stenographic notes are annexed to the interrogatories propounded in this case.

A. The answer is no. They are here in these records somewhere.

Q. I have here a copy of the reports of the copyright committee of Congress, 1924, which on Page 105 contains a number of pages of what purports to be the minutes of that meeting, is that correct?

A. Maybe I can save time if you will let me glance at it. I will admit the whole thing, whatever it is. What is it? The reprint of the minutes of those meetings? Yes, that is what was said and done, and correct and accurate, and are [fol. 391] authentic.

Q. I would like to read you two sections from Pages 112 and 113, statements made by you at that meeting, and ask you whether you made them: "Mr. Mills: Probably not more and I think certainly not less than fifty per cent, although I have made no accurate study on this point."—

Mr. Frohlich: I object unless he reads more of it.

Mr. Bennett: I will go back then.

Q. "Mr. Mills, you doubtless notice the programs as they are published in the papers. What percentage of those programs is included in the copyrights coming under your

control? Mr. Mills: Probably not more and I think certainly not less than fifty per cent, although I have made no accurate study on this point. I think we may safely say that of the time spent broadcasting music at least half is given to so-called popular and jazz music. Of such music we represent, as has been stated, more than ninety per cent. Of the other half of your musical program which we will say is of standard or high class music, the Society controls a minor portion only. As to such foreign works as are performed and which are subject to copyright, we control, say, forty per cent." Then skipping a paragraph which is on another subject—

Mr. Frohlich: I want you to read that. If you are going to read it, read it all.

[fol. 392] Q. "However, I ask your consideration here of the point of actual entertaining value. Popular or jazz music, broadcasted, suffers not nearly as much as high class music. The latter requires, for proper appreciation, the trained, educated music sense; hence the number of those entertained by this class of material is considerably less than those enjoying popular music, which requires but an ear attuned to simple harmonies, pleasing melodies. In the practical operation of broadcasting stations it seems very, very difficult to give a satisfactory rendition of a high class number; some of them we hear on our own set are execrable, whereas the popular tune does not suffer so in transmission. Played in the room or auditorium where an audience is present, high class music is difficult of satisfactory rendition; it loses much in radio transmission, and some of it becomes atrocious."

"Of the two classes of music, the popular has much the greater audience. We control ninety per cent of the popular music, a minor proportion of the high class music."

I ask you, Mr. Mills, at the time you made that statement was it true?

A. Yes, in my opinion in 1924.

Q. Now, in response to another question—

The Court: I don't think there is any necessity for further encumbering the record.

[fol. 393] Mr. Bennett: This takes up another proposition.

The Court: The witness has testified what is in there, and states it is a correct report of what he said. It is not necessary to ask him about any more.

Mr. Bennett: There are only these two statements of the witness. This other one pertains to standard material.

The Court: It is already in evidence, isn't it?

Mr. Bennett: No, sir, it isn't.

The Court: Do you want to put it in evidence?

Mr. Bennett: I think it would unduly encumber the record to put the entire report in evidence.

Mr. Frohlich: I object to putting the report in evidence.

The Court: So far I don't see the purpose of any part of it.

Mr. Bennett: There are only a few lines of it.

The Court: Very well.

Q. "Q. But, Mr. Mills, apparently these high class publishers have their own association, and if they see fit can enforce their copyright as to public performances of their [fol. 394] music." "Mr. Mills: Yes, absolutely." "Q. Then would it be correct to say that in these two organizations you would have practically a hundred per cent of the music that is copyrighted?" "Mr. Mills: Yes, sir." Was that statement correct at the time you made it?

A. Well, of course, it was correct. Are you meaning to infer I would have made it had I thought it not correct?

Q. Now, Mr. Mills, did the standard publishers to whom you referred in that last statement, later become members of the American Society?

A. Yes, sir, most of them.

Q. Your membership has increased materially since 1922, has it not?

A. Yes, sir.

Q. Both as to composers, authors and publishers?

A. Yes, sir.

Q. And in foreign societies affiliated with ASCAP?

A. Yes, sir.

Q. And the society's repertoire has remained proportionately about the same?

A. As to the total repertoire?

Q. Yes.

A. I would say yes.

Q. You referred in your testimony to the discussions or negotiations of 1932 with the broadcasters. Will you state what precipitated those discussions?

[fol. 395] A. A desire upon ASCAP's part and an announcement of that desire to the radio industry for an increase in fees being paid by broadcasters to the Society.

Q. About when was that made?

A. April 11, 1932.

Q. Was that made in a form of a letter?

A. Yes, sir.

Q. Do you have a copy of that letter here?

A. I do not have, but it is repetitiously in the records of trials of this sort.

Q. Will you state the substance of that letter?

A. The substance was it opened with the statement of the conditions in the industry and the distress of the American Society as they found themselves in by the diminution of their normal sources of revenue on account of the inroads of radio and the changes occurring in the music habits of the nation, a statement that commencing June 1st of that year the rates for American Society licenses would be a sustaining fee plus five per cent of the receipts of the stations for the sale of time on the air in respect of programs which used ASCAP's music, and in the case of a network broadcast the entire fee to be paid by the originating station.

Q. Five per cent of the gross income?

A. Five per cent of the receipts from the station for the sale of time on the air. There are a lot of other charges charged advertisers—a hundred different kinds of fees. [fol. 396] I am talking about receipts from sale of time on the air, and that only.

Q. What do you mean, Mr. Mills, by "time on the air"; what do you include in receipts for time on the air?

A. The amount paid by the advertiser for the number of minutes of the facilities of the broadcasting station which he purchases for the presentation of a program, and the usual "blursh" about his hair oil or his tooth paste or his breath rectified, or whatever it might be.

Q. You include talent charges in that?

A. No. What do you mean by "talent charges"? I don't know.

Q. Salaries or wages, whichever you wish to call them, to artists and orchestras and vocalists or whoever may be engaged in the program.

A. We don't include them in there. We don't rent them any artists.

Q. Do you include special services rendered by a broadcasting station to the advertiser in preparing the program?

Mr. Frohlich: I object to that.

A. Do we include what?

Mr. Bennett: He has insisted upon this time on the air thing.

Mr. Frohlich: If the Court please, I object to the witness giving any definition of a contract which is in evidence. [fol. 397] The radio contracts here in Nebraska are in evidence in this court that fully define each and every part of the contract.

The Court: Objection sustained.

Q. You say this letter was sent April 11th. What happened after that, Mr. Mills?

A. Well, the broadcasters let out a yell and said they didn't want to pay any more money, and couldn't pay and wouldn't pay any more money, and the industry finally appointed the National Association of Broadcasters as its spokesman to deal with the American Society. The National Association of Broadcasters in turn through its Board of Directors appointed a committee especially empowered to deal with the American Society, which committee—I presume you want the names—consisted of Mr. Ashby, general counsel, Edward Klauber, executive vice-president of the Columbia Broadcasting System, and Paul Morency, managing director of broadcasting station WTIC owned by the Travelers Insurance Company at Hartford, Connecticut. That committee was appointed to negotiate with the American Society in behalf of the National Association of Broadcasters which professed to speak for the industry.

Q. Did you extend the time to which the new rate would become effective?

A. Again and again and again, yes.

Q. Just a minute. Are you sure that it was several [fol. 398] "agains", or just one?

A. Until I had a beard nearly down to my knees, yes.

Q. What was the date to which it was extended?

A. We had established June 1st as the date upon which the new rates should become effective.

Q. Do you recall the meeting of April 19th?

A. Yes, sir.

Q. Do you recall at that meeting it was extended to September 1st?

A. Yes, sir.

Q. Did not the contracts go into effect September 1, 1934?

A. Retroactively, yes. They were not negotiated by September 1st, however.

Q. Did the broadcasters object to making a payment of a percentage on their gross business?

A. They objected to making any payment.

Q. Did they object to making a payment of a percentage on their gross business?

A. I have answered the question.

Q. Please answer the question.

The Court: The witness has answered it.

A. Yes.

Q. What offer did they make to the American Society?

The Court: Does it make any difference? There is a contract here, isn't there? What is the importance of the [fol. 399] details of these negotiations?

Mr. Bennett: The witness, in his direct examination in connection with all these negotiations, has very clearly brought out, or attempted to bring out, these contracts were entered into voluntarily by the industries, and not because they had any other option. The details of the manner in which these negotiations are conducted, I submit, will demonstrate the inability and the method by which the various users of music were compelled right at the last minute to enter into the agreements on the terms fixed and determined by the Society, not by mutual agreement.

A. But we never did get the terms we attempted to fix in any case, not a single case ever.

Q. You have a uniform contract to the broadcasters at the present time?

A. But not on the terms we dictated.

Q. No?

A. No.

Q. Do you remember a meeting of your Board of Directors on June 3, 1934?

A. I presume so. I attended all the meetings when I have been in town. If there was a meeting, I attended it.

Q. What was the formula you were instructed to negotiate with the broadcasters presented to that board meeting [fol. 400] ing and approved by your board meeting?

A. What was that date?

Q. June 3, 1932.

A. I don't remember. I would have to refresh my memory from the minutes.

Q. Have you got your minutes? May I refresh your recollection by reading you an extract from them?

A. Yes, you may. Do you mean to tell me you want to read an extract from the minutes of the meeting of the Board of Directors?

Q. I think that is immaterial to the issues of this case.

Mr. Frohlich: From what are you reading?

Mr. Bennett: From a copy of your minutes.

The Witness: I would like to know how you came into possession of it.

Mr. Bennett: (Reading) "Commencing January 1, 1933 a large number"—

Mr. Frohlich: I object to it. There is nothing to show Mr. Bennett is reading from a real accurate copy of the minutes of our Board of Directors. If he has the minutes of the Board, I have no objection to him reading it, but something which he himself has prepared, we don't know whether it is authentic or true.

The Witness: If he has, we want to know it.

The Court: Just a minute. What is it you are purporting [fol. 401] to do?

Mr. Bennett: If the Court please, the complainants were requested to bring their records and they stated that they would. I have asked for the minutes of the directors' meetings.

Mr. Frohlich: You have not; there is no such request.

Mr. Bennett: I am merely trying to refresh the witness' recollection to a very important meeting of his Board of Directors of June 3, 1932.

The Court: Objection sustained. There is no basis for the authenticity of the matter from which you are reading.

Q. Mr. Mills, do you recall you were instructed by your Board to require from the broadcasters a formula as follows: "A sustaining fee equal to the amount paid for the year preceding, plus three per cent of the gross station income for the first year, four per cent for the second year, and five per cent for the third year, the agreement to be a three-year contract"?

A. No.

Q. You don't recall that?

A. No.

Q. You mean to state you received no such instructions?

A. I say I did not recall that, and now I say I received no such instructions.

[fol. 402] Q. Do you recall a meeting at your home along around the middle of August with Mr. Edward Klauber, vice-president of the Columbia Broadcasting System and one of the members of the committee?

A. Mr. Sidney Kaye, general counsel, who visited me socially at my home in Shelter Island.

Q. Do you recall the substance of the discussions at that meeting?

A. Yes.

Q. Did you not reach a form of agreement with Mr. Klauber and Mr. Kaye at that time?

A. No.

Q. A method?

A. As to anything, no.

Q. When did you have the meeting of your Board of Directors which approved the formula for broadcasting, that ultimately went into effect September 1, 1932?

A. Well, undoubtedly shortly following the agreement between the committee representing the American Society and the committee representing the N. A. B. that such a formula would be acceptable to both sides, and we would have as soon as possible a meeting of the Board of Directors to confirm it for our part, the same as they would for their part.

Q. Did you or did you not shortly before September 1, 1932, call on Edward Klauber after a board meeting of your [fol. 403] Board and say to Mr. Klauber that your Board had turned you down on your recommendations; that the only formula they would accept was a sustaining fee equal to that paid by the station the preceding year, plus three per cent of its gross income for the first year, four per cent for the second year, and five per cent for the third year?

Mr. Frohlich: I object to that, your Honors, and object further questioning as to the details of these negotiations.

Mr. Bennett: I can prove the facts.

Mr. Frohlich: We are taking up a lot of time of the Court over nothing.

The Court: You may answer, if you know.

A. I don't remember.

Q. It is a fact, though, that is the contract that was entered into and submitted to stations effective as of September 1, 1932?

A. It is a fact that is the formula that was approved at the time by the committees authorized to represent both organizations, and the formula ultimately went into effect.

Q. Just a minute, Mr. Mills.

A. I will answer you.

Q. It is a fact that is the formula in the contract put into effect as of September 1, 1932?

Mr. Frohlich: I object to that as immaterial.

[fol. 404] The Court: Sustained.

Q. Mr. Mills, that contract was for a three-year period, was it not?

A. That is right.

The Court: Is the contract in evidence, and printed?

Mr. Bennett: Not that one.

Mr. Frohlich: Yes, it is, it is in evidence.

Q. That original agreement of 1932 expired August 31, 1935?

A. It was for three years, and it expired three years after the effective beginning date.

Q. Mr. Mills, you recall the discussions for renewal of that contract in 1935, do you not?

A. Yes.

Q. You were present at those discussions?

A. Yes.

Q. Do you recall with whom you discussed those renewals?

A. The committee representing the National Association of Broadcasters.

Q. Do you recall the individuals?

A. The same cast, more or less.

Q. Mr. Klauber?

A. Yes, and Mr. Ashby.

Q. Mr. Levy?

A. And Mr. Levy.

Q. Mr. Ashby?

[fol. 405] A. Yes.

Q. And Mr. Hostetler of Baker, Hostetler, Sidlow and so forth?

A. Not them.

Q. You do not recall Mr. Hostetler being there?

A. He was not present at the preliminary conferences.

Q. Was he present at any of the conferences?

A. At the very end of them.

Q. Was Mr. Phillip G. Loucks present there?

A. Yes, I think so.

Q. When did those conferences start, Mr. Mills?

A. You mean the date?

Q. Approximately, to the best of your recollection.

A. I would say they started August, probably, 1935, three or four months before the expiration of the agreement.

Q. The contracts you know were expiring August 31st?

A. Then three or four months prior to that date.

Q. May I refresh your recollection as to a few dates and happenings at that time?

A. Yes.

Q. Do you recall that on or about the 5th of May or the 6th of May a suit was filed, known as the United States versus the American Society et al?

Mr. Frohlich: I object to that, your Honors.

The Court: Objection sustained.

Q. Do you recall meeting with the committee about the 21st of May, 1935?

[fol. 406] A. Which committee?

Q. Of the committee of broadcasters.

A. The committee of the National Association of Broadcasters?

Q. The committee of broadcasters we named.

A. A committee representing the National Association of Broadcasters?

Q. Yes.

A. Yes, sir.

Q. At that time did you make an offer to the broadcasters to extend all contracts for a period of five years from December 31, 1935, without increases in fees?

A. Well, I wouldn't say from my recollection it was quite as simple as that.

Q. You did ultimately make that?

A. Ultimately that was the arrangement, yes.

Q. Do you recall that the committee requested extension for the duration of the suit then pending?

A. What suit?

Q. The so-called government suit, the United States versus the American Society.

Mr. Frohlich: I object to that.

The Court: Sustained. It is not cross-examination of anything, and assuming facts not proper and wholly immaterial as far as the Court can see.

[fol. 407] Q. When was the last meeting? Did you have a number of meetings between the latter part of May, 1935 and the first five or six days of June, 1935 with this committee of broadcasters?

A. I presume so, yes, sir.

Q. Did you reach an agreement with the committee on behalf of the industry?

A. The committee on behalf of the industry and myself on behalf of the American Society.

Q. Did the committee agree to an extension for five years without increases of fees, and did they agree to that on behalf of the entire industry?

A. Yes, to both parts of the question.

Q. Are you sure of that, Mr. Mills?

A. Yes, to both parts of the question. I wouldn't say the N. A. B. specifically said all broadcasters are to be bound by this formula we had negotiated, but the N. A. B. purported to speak on behalf of the industry. They have always said we speak for the industry; the broadcasters will do what we tell them to.

Q. Is it not a fact, Mr. Mills, they refused that on behalf of the industry?

A. Well, not to my recollection. Well, they attempted to refuse anything on behalf of the industry and attempted to get the rates reduced.

Q. I am talking about the first part of June, 1935.

[fol. 408] A. I can't distinguish one of these meetings from another in my memory, because so many of them were constant and repetitious. One meeting was on this ground, and another meeting on that ground, and there was ground gained and lost by both sides in the negotiations in our attempt to get more favorable conditions and their attempt to buy music cheaper.

Q. Just a minute, Mr. Mills. Is it not a fact Mr. Isaac D. Levy, owner of station WCAN, and Mr. Klauber on behalf of the Columbia Broadcasting System, and Mr. Ashby or one of the other officials of N. B. C. on behalf of the National Broadcasting Company, about the 6th of June, 1935 entered into a renewal agreement of their existing contracts, extending those contracts for a period of five years from December 31, 1935, with some increases in fees so far as the network was concerned?

Mr. Frohlich: I object to that as incompetent, irrelevant and immaterial. I don't see how we are going to pick the negotiations apart and prove every contract was signed, or we are going to be here all day on just one phase of this case.

The Court: What is the theory of the offer?

Mr. Bennett: I will demonstrate by a correct answer to that that as a result of that action some three hundred broadcasting stations throughout the United States were [fol. 409] compelled to accept the demands of the Society.

The Court: This voluntary statement is not based on any evidence, and it will be stricken from the record. Ask the question again.

(Question read.)

A. Why pick out Levy—he is not the owner of station WCAN.

Q. He is one of the owners, is he not?

A. Well, I can't identify the time and sequence into which these conferences and agreements were reached; I just can't separate them in my memory, one from the other. You asked me on or about that date. I can't say that date or some other date, or preceded or succeeded some other particular conference. It would have to be better identified for me.

Q. It did happen approximately that time?

A. I don't know when it happened.

Q. But it did happen, did it not?

The Court: Are those contracts in evidence?

The Witness: Yes.

Mr. Bennett: They are not in evidence in this suit, your Honors.

The Court: They are in writing?

Mr. Bennett: Yes, but I am sure he is familiar with the contents. He signed them himself, and I was going to question him about the contents of those contracts.

[fol. 410] The Court: The most accurate evidence with reference to them is the contract itself. The objection to this testimony is sustained.

Q. Mr. Mills, have you ever notified the Columbia Broadcasting System, or the National Broadcasting System, to cease delivering programs to affiliated stations under provisions of your agreement with N. B. C. and C. B. S.?

A. You asked me if I had? The answer will be no.

Q. Has the Society ever notified them to cease delivering programs?

A. A later witness will have to testify to that.

Mr. Frohlich: Object to any testimony along that line.

The Court: The witness has testified he will not be able to answer.

Q. Are you personally familiar with your agreement with C. B. S. and N. B. C.?

A. In general.

Q. Does that agreement contain a provision that they shall not deliver programs to any station which does not have a license from the American Society?

A. Yes.

Q. Now, Mr. Mills, the latter part of 1935, you testified, I believe, and the record shows that effective as of January 1, 1936 the Warner Bros. subsidiaries of Harms, Witmark and several other musical publishers withdrew from membership. That is correct, is it not?

A. Yes, sir.

Q. Did you have discussions with Mr. James W. Baldwin as managing director of the National Association of Broadcasters toward the latter part of 1935?

A. Yes.

Q. Did Mr. Baldwin bring up the question of the American Society fee which should be paid by stations for the depleted catalog?

A. Yes.

Mr. Frohlich: Just a moment. I object to that question and to any other similar questions along that line, because it is going into the matter of Warner Bros., already covered by Mr. Hotz.

The Court: The answer may stand, but there is no use going over the same ground again.

Q. Mr. Mills, did ASCAP make any reduction to the broadcasting stations because of the loss of that material?

A. No.

Q. Did you or did the American Society on or about January 11, 1936 send telegrams to all stations in the United States demanding that the renewal agreements be signed not later than January 15th?

A. Have you got one of the telegrams?

Q. I do not have, but you should have; it is your telegram.

[fol. 412] A. I don't know. You say the date we sent them telegrams demanding something? The telegrams speak for themselves.

Mr. Bennett: Do you have the telegram, Mr. Frohlich?

Mr. Froehlich: We don't have it.

Q. I don't have a copy of that telegram with me, but there was a communication.

A. I don't know what it said.

Q. Do you recall that there was such a communication sent?

A. There was a communication sent about the necessity of renewing the licenses which were expiring. They were probably advised if they didn't renew them on and after the expiration date, the music could not be legally performed for the purpose of profit without the consent of ASCAP; therefore, get a license.

Q. Those were at the same price; you were making no reductions?

A. The renewed agreements are in evidence, and show what the terms were.

Q. Those renewals made no reduction for the loss of the Warner material?

Mr. Frohlich: I object to that.

The Court: Objection sustained.

Q. Just one or two more questions. On your direct testimony you stated that the broadcasting industry from time to time had requested from you or the American Society a formula for the payment of fees on a per piece performance basis, and at times on a per program payment basis, did you not?

A. Who had requested that?

Q. The broadcasting industry, the representatives of the broadcasting industry.

A. No. Individual broadcasters, not the broadcasting industry.

Q. You say that none of these committees have requested such a formula?

A. None have discussed such a formula.

Q. Don't you know at the present moment that request has been pending for the last five or six months?

A. I don't know that, and it has not been made.

Q. By a committee?

A. It has not been made.

Q. I said the American Society, and whether you knew it.

A. I don't know it.

Mr. Bennett: That is all.

Redirect examination.

By Mr. Frohlich:

Q. Mr. Mills, did you ever prepare a list of music publishers in the United States?

A. Yes, sir.

Q. I show you this document and ask you whether that is a list you prepared?

A. Yes, sir; it is a list of music publishers in the United [fol. 414] States so far as it is shown by our records.

Q. Does that include publishers of ASCAP?

A. All publishers in the United States shown by the records of the copyright office, by our records and by the various trade magazines and all sources to which we know of to go—the names and addresses.

Q. How recently was that prepared?

A. Probably last year.

Mr. Frohlich: I would like to offer in evidence plaintiff's Exhibit Number 37.

The Witness: That list has been offered to all broadcasting stations in the United States alphabetically listed.

Mr. Hotz: Might I interrogate the witness just a moment to find out about this?

The Court: You may.

By Mr. Hotz:

Q. Now, you have in here music stores that sell music.

A. But we have in there also music stores, owners of copyrights, in musical compositions. For instance, Jenkins Music Company of Kansas City, Missouri, which own Piccolo Pete and Saxophone Sam and a number of very important musical compositions. The Theodore Presser Company of Philadelphia, one of the largest dealers in sheet music and jobbers of sheet music in the United States, and [fol. 415] Oliver Ditson Company, Inc. of Boston, and Lyon & Healy of Chicago, and Sherman, Clay & Company of San Francisco.

Q. And who else?

A. Well, I will take the list and go down through it.

Q. I don't want the ordinary music stores throughout the country.

A. You haven't got any, so far as I know.

Q. In this Exhibit Number 37 you haven't any music stores?

A. Which one have I there that is just a music store?

Q. Let us find out what a music store is.

A. A store that deals in sheet music and music accessories and retails publicly.

Q. None of those are in here?

A. None, no.

Q. What are the publishers, just what are their functions, the publisher members of the association? When we say your publisher members like Harms, like Remick, like Witmark and the rest of those large New York publishing houses, what are their functions, just how do they operate, what do they do?

A. Well, they get the manuscript of a new song, a new piece of vocal or instrumental music from the composer or author. He brings it around and plays it for them and demonstrates it to them, and says it is going to be a great song and sure to be a hit, and the publisher, according to his judgment, decides he will invest a very substantial sum [fol. 416] of money in trying to find out whether the public believes it is a hit. He takes the composition and manuscript from the composer and author, and sends it in to one of his expert arrangers, who works and makes a business making piano arrangements and orchestrations and all that sort of thing, from this manuscript which the author and

composer have submitted. He decides to publish it so that he gives the author and composer, or authors and composers, if plural, in either both or either case, a contract, in which he takes over the publication rights of the song and the copyrighting of the song, the entire works. He proceeds then with the publication of what is called "professional copies". You want me to go into this?

Q. Yes.

A. Professional copies from the manuscript of the composition are finally worked into shape by the arrangers. These professional copies are distributed to orchestras and dance halls and singers and artists and so forth throughout the country. It begins what is called commercial exploitation of the songs. If the artists like the song they play, and the broadcasters like it, they put it on their programs; if the motion picture theatres like it, they have their pianist or organist play it, or the motion picture people put it in a picture, and all that sort of thing. The public likes the song, we hope. In most cases, it doesn't; it likes about one out of every thirty. If as and when the public demonstrates an interest in the song, what are called regular piano copies are then issued. It is a copy usually on a good grade of paper with two colors. You have a lithographed sheet nicely produced, and it is sent to the music jobbers, in circular letters sent to the dealers, and advertisements are put in the trade papers calling attention to the quality and public popularity of this new composition. Orchestra leaders are playing it, and if the public likes the sheet music, the music stores have the music and they sell it to the public. And that is about the routine production of the publication of a song.

Q. Now, those publisher members, they are really wholesalers, aren't they?

A. They are producers. Wholesalers are jobbers; the publisher doesn't act as jobber.

Q. Publisher members are more like manufacturers?

A. Yes, sir. The writer is the producer, the publisher is the manufacturer, and the jobber is the middle man.

Q. That music gotten up and sponsored by the publisher members, such as Witmark, is sold out into the territory throughout the United States?

A. The music store in Lincoln will be selling copies and phonograph records.

Q. And at Omaha, Patton's and Schmoller & Mueller, and every hamlet in the State of Nebraska?

A. That is right.

[fol. 418] Q. The jobbers in this line of business are middle men?

A. Yes, sir.

Q. They don't make any deals with the author and publisher?

A. No, they have no contact with them.

Q. These music stores in Nebraska don't make any deals with the publishers? They do not have the facilities?

Mr. Frohlich: I object to any further questions along that line, because Mr. Hotz stated he wanted to cross-examine the witness for the purpose of making an objection to this Exhibit Number 37, and I think he has gone far enough on that.

The Court: Yes.

Q. Now then, what does this box of exhibits contain?

A. A complete list—

Mr. Hotz: Withdraw that question.

Q. In the light of the question I have just asked you about the mechanics of publishing this music, Mr. Mills, what I want to get at is how many of these publishers in this list there might be, such as are in your organization and listed as publisher members, in this list you have here.

A. In that list will be all of our members, so obviously a hundred odd of the names in there are publishers such as would be in our organization.

Q. Of that kind of publisher, let's say, how many would you say would be in this list?

[fol. 419] A. There are all kinds of publishers in ASCAP.

The Court: That isn't answering the question.

Q. Of your publisher members.

The Court: How many of your members?

A. One hundred and twelve is the membership of the Society.

Q. Are there any more in this list like that, and if so, how many who function as they do?

A. They all function in the same manner. Now, not all are as large as some of the publishers in the American So-

ciety, but some of the members in the American Society are as small as any of those in the list. There may be some in the list smaller, if that is what you are getting at.

Q. How would I know in going through this list here of just what are music houses, what might be construed as music houses that have no publishing facilities; we might say manufacturing facilities?

A. There are relatively none such in there. There may be some one in there on the records of the Register of Copyrights as a publisher, who has, in fact, since become simply a music dealer—I don't know. There would be none such there as far as our records are concerned. This list combines the names from all sources where we could find them, of music publishers largely, and also the list of the Register of Copyrights at Washington.

Mr. Hotz: Object to plaintiffs' Exhibit Number 37 for the [fol. 420] reason that it tends to encumber the record. It does not prove anything that is material to the issues of this case, and there is nothing to show by the witness, nor by the exhibit itself, if your Honors please, by the form of the exhibit itself, what it is and what bearing it has on the issues in this case, and what relation relatively to the publisher members of the American Society. You can't tell anything about it.

The Court: It shows what the association did in that regard. The objection is overruled.

Mr. Frohlich: That is all.

Mr. Hotz: That is all.

Witness excused.

[fol. 421] JOHN GREGG PAINE, called as a witness on behalf of the complainants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. What is your name?

A. John Gregg Paine.

Q. Where do you reside?

A. Wilton, Connecticut.

Q. How long have you been a resident of that state?

A. Seven years.

Q. Are you in any way connected with the American Society?

A. I am the general manager.

Q. How long have you been such?

A. Since May 1, 1937.

Q. And prior to assuming your duties as general manager of the Society, what occupation did you follow?

A. You mean immediately prior?

Q. Yes.

A. Immediately prior to that I was chairman of the Board of the Music Publishers Protective Association.

Q. What kind of an association is that, a trade organization?

A. A trade association of the music of a certain number of music publishers.

[fol. 422] Q. How long were you connected with that organization?

A. From October, 1929 to May, 1937.

Q. Has that organization anything to do with the Society?

A. Nothing.

Q. Has it any connection in shape, manner or form?

A. Not in any way, shape, manner or form.

Q. Are there some publisher members of the Society who are also members of that organization?

A. Oh, yes, and some who are not members of this Society.

Q. By the way, have the writers of the American Society also their own trade organization?

A. Yes, they have.

Q. What is the name of that association?

A. Song Writers Protective Association.

Q. Prior to your coming with the Publishers Protective Association, did you have any connection with any other company or firm in the entertainment field?

A. Yes.

Q. Will you please state what it was?

A. From the time I finished law school in 1914 to 1927 I was with the Victor Talking Machine Company, in charge of their copyright work, and subsequently from 1927 to 1929 I had charge of the copyright work of Warner Bros., Inc.

Q. In your duties in connection with these various occupations you have described, did you become familiar with the music publishing business?

[fol. 423] A. Oh, yes, that was my business.

Q. Can you state that you know the customs and the usages of that business?

A. Yes, sir.

Q. You know how publishers operate and how writers operate?

A. Yes.

Q. Did you at my request make up a list of musical compositions which were composed by William J. Hill, one of the plaintiffs in this action, a member of this Society?

A. I did.

Q. I show you a list and ask you whether that is a correct and accurate list of the compositions of Mr. Hill on the files and according to the records of the American Society?

A. This is a correct and accurate list of Billy Hill's compositions.

Mr. Frohlich: I would like to offer in evidence plaintiffs' Exhibit Number 38.

Mr. Hotz: What is the purpose of it?

Mr. Frohlich: He is one of the plaintiffs.

Mr. Hotz: I suppose you have a list for Sousa?

Mr. Frohlich: Yes, sir.

Mr. Hotz: And your object is to show the interest those plaintiffs have in this case?

Mr. Frohlich: Yes.

Mr. Hotz: We have no objection.

[fol. 424] Q. I show you a similar list of the musical compositions of John Philip Sousa. Did you prepare that from your office records?

A. Yes, sir.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 39.

Q. I also show you a list of the works of Oley Speaks, one of the plaintiffs. Was that likewise prepared by you?

A. Prepared by me from the office records, and this is the one prepared.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 40.

Q. I show you a list of the works of Deems Taylor, one of the plaintiffs. Was that likewise prepared from your office records of the American Society?

A. It was prepared from our office records, and this is the one I prepared.

Mr. Frohlich: I would like to offer in evidence plaintiffs' Exhibit Number 41.

Q. Now, you were with the Victor Talking Machine for approximately thirteen years, is that right?

A. That is correct, yes, sir.

Q. Now, were you the head of their copyright department?

A. Yes, sir.

Q. What particular function did you exercise there?

A. The purpose was to clear the copyrights for such [fol. 425] musical compositions as they desired to use on their records. I was employed there to study the copyright status of those records, both in the United States and all territory in the world in which the Victor Company did business, and to obtain contracts wherever the contracts were necessary.

Q. When you say you were to clear titles, you meant to pay whatever fees were necessary to be paid and obtain proper licenses for the rightful owners to permit the Victor Company to make a record of that composition?

A. So that we could record without infringement.

Q. The Victor Company is the largest company of its kind in America?

A. Yes, sir.

Q. And it has made and sold a great many thousands of records all over the years?

A. A great many millions over the years.

Q. Did you have occasion to familiarize yourself while you were with the Victor Machine Company with the titles of compositions that were in the public domain in the United States?

A. Yes; I had a catalog of musical compositions, and I was still engaged in the creation of such a catalog when I left.

Q. The Victor Company made up its own catalog of public domain music?

A. Yes, sir, in the United States.

Q. You left the Victor Company in 1927, is that right?

A. Yes, sir.

[fol. 426] Q. Had you looked at that catalog shortly prior to your leaving the company?

A. Yes, sir.

Q. Were you familiar with the catalog?

A. Yes, sir.

Q. How many titles would you say there were of compositions in the public domain of that catalog?

A. We had close to a million titles—over nine hundred thousand; I don't remember the exact number—over nine hundred thousand.

Q. Nine hundred thousand musical compositions in the United States, and which nobody owned the copyright on?

A. They were in the public domain.

Q. If it had a copyright, it had expired by limitation of time?

A. Yes. Of course, that didn't cover all public domain, that was just part of the public domain we had cataloged.

Q. A portion of it?

A. Yes, sir.

Q. Since 1927 would it be safe to say that additional public domain music has come around?

A. Oh, my, yes.

Q. A great many thousands of compositions?

A. Yes.

Q. Can you estimate with some degree of certainty how many additional copies there would be since 1927?

A. It would be a very, very difficult thing to do.

[fol. 427] Q. You would rather not guess?

A. I would rather not guess.

Q. What are the popular dances in the past few years?

A. Well, the dance form changes from time to time. The popular dance of the last few years has been the rhumba and the tango and the fox trot, and recently the polka has come back, and personally I am glad about that.

Q. As a matter of fact, hasn't a great many compositions in the public domain been transposed or arranged or adopted so that they may be danced today by the rhumba and fox trot and similar dances?

A. Yes.

Q. As a matter of fact, for a great many years now has there been a tendency on the part of the music world to take old numbers and change the rhythm and time and adapt them to modern dancing?

A. That is right.

Q. That has been done with a great many compositions that you say were in the public domain?

A. They do that constantly—"A Tisket a Tasket" an old nursery rhyme was modernized into a dance and a very popular one.

Q. So that would you say there could be played today out of this great catalog of public domain music a sufficient amount of music to offer dancing entertainment for the public?

[fol. 428] A. Yes. For example, there are more rhumbas in the public domain than copyrighted—many, many more.

Q. A great many of the rhumbas come from South America?

A. Yes, and they don't want to bother copyrighting them in the United States. The same is true of the tango—there are many, many more in the public domain than in the copyright field.

Q. Would you say a dance hall today or a radio broadcast could play and perform a sufficient amount of music to entertain for dancing purposes without having to dip at all into the reservoir of the American Society?

A. Certainly. Any user could—not as cheaply as with us, but they could do it.

Q. Has the Victor Company any affiliation with any broadcasting company whatsoever?

A. Yes; it is now the R. C. A. Victor Company. When I was connected with it, it was the Victor Talking Machine Company.

Q. "R. C. A." stands for the Radio Corporation of America, is that right?

A. Yes. And also owns the National Broadcasting Company.

Q. Which all in turn are owned by the General Electric Company and the Westinghouse Company?

A. I understand that is so.

Q. So that the Victor Company and the National Broadcasting Company are now affiliated corporations?

A. Yes, sir.

[fol. 429] Q. Having a common interest?

A. Yes, sir.

Q. These phonograph records of public domain music, which were made by the Victor Talking Machine Company, are now available to the National Broadcasting Company as well as to others, isn't that right?

A. They have a library of them offered to all radio stations. Every radio station in the country has a catalog of Victor public domain music.

Q. Does the Victor Company furnish any records to broadcasting stations for performing rights of this public domain music?

A. Yes, they do.

Mr. Hotz: I object to that because it is not a definite question. He says music that is furnished by the Victor Company to various broadcasting stations. Do you mean records?

Mr. Frohlich: I mean in the form of records.

The Witness: Recorded music.

Mr. Hotz: You didn't say that; you said music. You are talking about records now?

The Witness: Recorded music.

Mr. Hotz: With that explanation I withdraw my objection.

Q. Has Columbia any affiliation with any record company?

A. They recently purchased the American Record Company.

Q. Does the American Record Company have a catalog of [fol. 430] public domain music?

A. That is the old Columbia Phonograph Company, and I think they have consolidated the Brunswick and Columbia and the old American Record Company, and they gathered up a great number of companies.

Q. Phonograph companies?

A. Old phonograph companies.

Q. These other phonograph companies and the American Record Company have a similar catalog of public domain music?

A. Yes, public domain and copyrighted.

Q. And the American Record Company is now a subsidiary or affiliate of the Columbia Broadcasting Company?

A. It is owned by the Columbia Broadcasting Company.

Q. Do the broadcasting companies, and if you know of your own knowledge otherwise please do not answer, have libraries or catalogs of music in the public domain in addition to the catalog prepared by the Victor Company and the American Record Company?

A. Yes, they do. You mean available to them?

Q. Yes.

A. Yes, they do. They have the Langloise & Wentworth catalog which is originally all public domain music. Re-

cently they have been recording works that they have purchased from the authors, in the nature of hill-billy songs and that sort, which they have added to their catalog, but all tax free. There is the Davis & Schwegler catalog; there [fol. 431] are other catalogs available to them, which is part public domain and part copyrighted. There is McGregor-Solle Standard Radio. Well, I don't know—there are quite a number of them; there are quite a number of companies engaged in the United States in recording music on order, so that an advertiser that desires to put on a recorded program, if he wants to have public domain music in that recorded music, can go to one of these recording companies and they will make a record for him.

Q. I will ask you if the Schubert Publishing Company has a catalog of music which is not in the control of the American Society?

A. The Schubert Publishing Company is owned by—

Q. Bright, Coff & Hartel?

A. Bright, Coff & Hartel is a German firm with offices in New York and do a great deal of publishing in the United States of great German copyrights.

Q. Which are not owned or controlled in any way by the American Society?

A. No, which are not owned or controlled in any way by the American Society. The Universal Edition is another tremendous catalog not owned or controlled by the American Society.

Q. How about the Associated?

A. Well, the Associated Music Publishers, which Mr. Mills mentioned, is a group of large publishing houses—[fol. 432] they call themselves "Associated Music Publishers", and none of them are in the American Society repertoire.

Q. G. Recorde Milan?

A. That is an independent, and not a Society repertoire.

Q. These firms names you have mentioned have extensive catalogs, haven't they, of music not owned or controlled by the Society?

A. Big catalogs.

Q. Would you say there were many thousands of compositions in the aggregate of those firms?

A. Yes, I would say all kinds of music.

Q. Satisfactory for all entertainment purposes?

A. Satisfactory for all entertainment purposes. It may not be so rich in fox trots, but in everything else it is an enormously rich catalog.

Q. As a matter of fact, you heard the testimony yesterday in the court room? You were here, weren't you?

A. Yes, sir.

Q. You heard Mr. Buck describe a hit song or a hit number. In the past ten years have there been a great many hit numbers created by publishers, writers and composers who are not members of the American Society?

A. Oh, yes.

Q. Will you be good enough to state a few of those numbers?

A. Well, there are two big hits running at the present time, neither of which were composed by members of the society.

[fol. 433] Q. What are they?

A. Beer Barrel Polka and Sunrise Serenade—two very, very popular musical compositions, neither of them composed by members of the American Society.

Q. Has the American Society the performing rights?

A. On the Beer Barrel Polka it has, but the Sunrise Serenade, it has not.

Q. Does it derive the rights from the publisher?

A. Yes.

Q. Can you give us an illustration?

A. "My Dear Miss Duchesne" was not composed by a member of the American Society, and it was available for use for a great many years to the radio, but they never used it until a publisher in the American Society had translated the lyrics and put in the English lyrics, and that became a very popular musical composition. The whole Snow White score of lovely music connected with pictures was not composed by members of the American Society. They have since been made members because of that very fine job they did. I can't recall any more, but there are quantities of them, plenty of them.

Q. You heard the testimony in the court room yesterday there had been a great diminution in revenue from the income of sheet music since 1927, and of your own knowledge and your experience in this business would you say that is true and correct?

[fol. 434] A. Oh, yes, it is alarmingly true.

Q. The testimony yesterday was confined to 1927 down to 1933. Would you say that the same condition existed today as it existed in 1933?

A. Generally speaking, the condition today is much worse than it has ever been in the history of the music publishing business.

Q. You are familiar, aren't you, with these big publishing houses in New York and the small publishing houses in New York and elsewhere throughout the country?

A. Yes, sir.

Q. And you know the publishing situation fairly well, isn't that right?

A. Yes, sir.

Q. Are these music publishers, members of ASCAP today, able to operate their business enterprises on the profits and moneys received from phonograph records and from the sale of sheet music?

A. No, sir, they certainly cannot.

Q. In days gone by, the sale of sheet music was a very substantial income, wasn't it?

A. Yes, sir.

Q. In fact, a tremendous income?

A. Yes, sir.

Q. And tremendous business profits, isn't that right?

A. Yes, and they did not publish so much music.

[fol. 435] Q. And the income from phonograph records was a very substantial sum in the old days?

A. Yes, sir.

Q. Today, isn't it a fact, that so far as the American Society is concerned, that the largest and most substantial income is the income obtained from ASCAP for these performing rights?

A. What they get from the American Society determines whether or not their year's operation is in the red or black.

Q. You heard Mr. Mills describe the method by which a song is published. What would you say is the expense of publishing the average musical composition today?

A. One of the great difficulties today is that today the cost of publication has gone up very enormously. The demand for music has increased at a tremendous rate, as the public demands a lot more music, and it is more expensive than before. I can give you a general idea of the cost of making a piano arrangement. You see, when a writer comes in he brings you a sheet with the lyrics and so on. It is not

in very usable form, and it has to be arranged now for a piano number. The cost of arranging that averages from twenty-five dollars to thirty-five dollars, depending on the salary of the arranger in the established publishing house. When put in that form it is still a manuscript and it is sent to a printer and plates have to be made, usually four plates. The cost under the present union rates is four dollars per [fol. 436] plate. Then a title cover has to be made, and that has to be drawn. You used to get them for twenty-five dollars and now you pay about fifty dollars per title page, and then you have to have two plates made—two-color plates made, and if three-color plates, three-color plates have to be made, costing in the neighborhood of eight dollars apiece for those. Then you print it and the printing costs have gone up to a point where it is twenty-four dollars a thousand if you only want one thousand, and twenty-one dollars a thousand if you want more than one thousand. You usually order about five thousand printed originally. Then, of course, you have it only in piano form and that isn't usable as a musical composition to a great entertainment world. So it has to be put into orchestral form and has to have an orchestration made. Those orchestrations, if dance orchestrations, are made as a rule by specialists in the field; they get three hundred dollars for an orchestration. The orchestration contains anywhere from sixteen to twenty-four plates at four dollars a plate, and printing an orchestration costs eleven cents apiece. They usually get from twenty-five hundred to five thousand orchestrations of these dance orchestrations. Then, of course, the entertainment world today has a great many singers with orchestras, and people who sing with the orchestras, so they have to get a vocal orchestration and you have to go through the job again. So that altogether when you multiply and add it all [fol. 437] up it costs anywhere from fifteen hundred dollars to twenty-five hundred dollars to publish a musical composition of the popular dance type.

Q. That is without cost of publication?

A. Yes, sir.

Q. That doesn't pay for the exploitation of the song in order to give it popularity?

A. No. Then you begin to exploit it.

Q. How is that done?

A. All publishers have what they call professional men, a very technical and specialized field of operation. These

professional men are men who have a wide acquaintance-ship in the field of performance. They know orchestra leaders and they know singers and quartets and all kinds of instrumentalists and people who happen to know music.

Q. Stage entertainers and vaudeville artists?

A. Yes, sir. Not only do they know them personally but they know their art and know the type of thing they like. There is no use offering Rudy Vallee, for example, something that Lawrence Tibbet ought to sing. They have to know all about it; they are very skilled people. They take hold of these musical compositions and begin to schedule a series of contacts. They know whom they are going to see, and that this is a song they would like to have—they believe that Kate Smith is interested in it, so they see Kate Smith. He has an opportunity to study that song and get [fol. 438] to know it, and know something of the background of Rudy Vallee; or if it is a rhythm number then they feel they ought to go to Benny Goodman or Fred Waring or some of the bands that specialize in rhythm performances. Those men receive salaries—a new one just starting in the field will get fifty dollars a week, and a very highly skilled one, a very experienced one, will get seven hundred and fifty dollars to one thousand dollars a week. Then they begin what is known as the exploitation of the song, seeing to it that the public gets to hear it through the artists who are capable of presenting that particular type of song to its public in its best manner.

Q. That is part of the overhead which must be allocated to each composition?

A. Yes.

Q. In addition to which are allocated the proportionate share of the printing, rent, general overhead and salaries to the employees?

A. The shipping department and all the rest.

Q. So that publishing a song is a proposition that involves an investment of some capital?

A. Yes, sir.

Q. About how many songs would a publisher publish in the course of a year?

A. Well, I had occasion to make a study of not a big publishing house but a very substantial house—Edward B. [fol. 439] Marks, and Marks in the course of the last two years has published three hundred and twenty-seven musical compositions. That is all kinds.

Q. How many were successful?

A. Well, in the popular field I would say that from my recollection there were eighty-nine popular musical compositions published during that period. The rest of them were quartets and music of all kinds, things which a music publishing house covers, and I think it is eighty-nine in the popular field where we talk of hits and so on and so forth. I don't believe that two of them has lived or will be in existence this time next year. That gives the mortality of popular songs.

Q. It is quite a risk and campaign, is it not?

A. Yes, it is a great risk and it is quite a campaign.

Q. You said something a moment ago about the increase in the use of music. Will you explain to the Court about this increase in the use of music?

A. Yes, I can give you some figures on that. The radio broadcasting industry, for example, we make a survey of that in the American Society by surveying the musical programs of the principal chains, the Red and Blue Networks, and the C. B. S. and about twenty-five independent stations so that it gives us a cross-section of the performance of music in about two hundred and fifty radio stations out of the entire radio industry. It is to be sure just a cross-[fol. 440] section. In the first quarter of 1936 we analyzed ten thousand programs from that group, and there were six hundred and eighty thousand performances of music in those programs. In the first quarter, the corresponding quarter, for 1939 we analyzed eighteen thousand programs from that same group of musical programs, and there were two million six hundred and thirty thousand performances in that period of time.

Q. While you analyzed only eight thousand more?

A. If it were twice as many it would still be a tremendous increase—over one hundred per cent increase.

Q. As a matter of fact, the radio today plays a song for three or four or five weeks and then that is the end of that song?

A. Right.

Q. And it uses up a lot of material?

A. Yes; a musical program in 1936 would have in a half hour ten musical compositions on the program; today they have twenty-one to thirty musical compositions—they just crowd it in.

Q. That means an author and composer has to be more active and has to do more composing than he would do years ago in order to get any revenue?

A. Yes, and the publishers, in order to get their revenue, have to increase tremendously their publication program.

(Whereupon an adjournment was taken until 1:30 o'clock P. M.)

[fol. 441] (Thereupon Mr. John Gregg Paine resumed the stand for further direct examination.)

By Mr. Frohlich:

Q. Mr. Paine, there was introduced into evidence Exhibits Numbers 17 and 18, two documents showing the gross revenue derived by the Society from the State of Nebraska over a period of years, and the expenses paid by the Society in the State of Nebraska for some of those years, and I would like to have you clear up for the Court a matter that there was some confusion about. Let us take this tabulation here on Exhibit Number 18, 1937. Will you be good enough to look at Exhibit Number 17 and state from that exhibit what were the gross royalty receipts for that year, 1937, in this state?

Mr. Hotz: Objected to that as having been asked and answered, and the exhibit speaks for itself.

Mr. Frohlich: There was some confusion about that, your Honors; it will only take a minute.

Mr. Hotz: I will withdraw the objection.

A. \$54,474.64 was gross revenue received from the State of Nebraska in 1937.

Q. Look at Exhibit Number 18 for the corresponding year, 1937, and state the items of expense on that, and tell us how you arrived at those expenses.

[fol. 442] A. There is General Expense in the first column of \$7,707.23. That is the proportion of the total American Society operation applicable to the State of Nebraska.

Q. The total expense throughout the United States?

A. That is the Nebraska share of the total expense throughout the United States. The next column is \$3,556.46 which is the commissions paid by the Society to the representatives in the State of Nebraska for the work which they

did here. There is \$115.34 legal expense, which is the proportionate share of the total legal expense applicable to the State of Nebraska, making a total of \$11,379.03, which is the total American Society expense applicable to the State of Nebraska.

Q. So if that expense of \$11,379.03 is deducted from \$54,474.64, it would leave approximately a balance of \$43,000.00?

A. That is right, distributable to the members.

Q. And that money is distributed to members on the classification system described here?

A. Yes, sir.

Q. Now, the publishers print up several copies of these compositions as they are published, is that the custom and rule?

A. That is correct.

Q. Do they sell to jobbers or dealers directly?

A. Those that are sold they sell to either the jobber or the dealer directly, principally to the jobber if it is popular music, and principally to the dealer if it is standard [fol. 443] music.

Q. Can you name some of the large publishers of music in the United States?

A. Yes, there is the Music Dealers Service in New York City; there is the Theodore Presser Company of Philadelphia; there is Lyon & Healy of Chicago; Grunwald of New Orleans, and Sherman Clay of San Francisco, and Jenkins of Kansas City.

Q. Does Sears Roebuck sell music?

A. Yes, they sell great quantities of it, but I don't think as a distributor. I mean by a distributor one wholesaler who resells to dealers—they resell to the public.

Q. They buy from a publisher and sell by mail?

A. Yes, sir.

Q. That would also hold true of Montgomery Ward?

A. Yes, sir, and big chain stores.

Q. How about Woolworth?

A. Not Woolworth, but Kresge and Kress.

Q. Isn't it a custom for the dealers of music in the country to purchase music directly from the jobbers, a considerable amount of it, by mail?

A. Yes, dealers all over the country usually purchase from jobbers because they can purchase a combined order. They have a great number of different publishers.

Q. Are there many dealers of music in the State of Nebraska?

A. I don't know.

Q. Well, now, would the dealers in the State of Nebraska [fol. 444] purchase their music from these jobbers in various parts of the country?

A. Yes.

Q. You know that is the customary thing?

A. That would be the custom.

Q. They do that by sending in an order to Lyon & Healy, say, for example, so many copies of this composition, and this composition, and send them a check for it or have them billed for it, and have it come in by mail?

A. That is right.

Q. Once a publisher sells his music to a jobber he loses all further control over that music, wouldn't he?

A. Yes.

Q. The title and physical sheet music passes to the jobber?

A. Yes.

Q. And all the jobber has to pay is for the music and not account for anything else?

A. Yes.

Q. And the jobber sells it at a price he sees fit, and the publisher has no control over the price?

A. None at all.

Q. How do the orchestras purchase their music?

A. Well, the principal orchestras, the name orchestras, rarely purchase any music; they have it given to them by the publishers. They are specialists, the big main orchestras, nearly all specialists.

[fol. 445] Q. Take the little bands.

A. They buy, as a rule, by a mail order from the jobber or some large dealer. The small dealer doesn't have orchestrations.

Q. They have to purchase orchestrations?

A. Yes.

Q. If a publisher were compelled to comply with the statute he would have to put on the face of the musical composition the price for performing right and every other right he thinks he is entitled to, isn't that right?

A. Yes.

Mr. Hotz: Move to strike out the answer until an objection can be made.

The Court: Sustained; it may be stricken out.

Mr. Hotz: Object to the question as calling for a conclusion of the witness.

The Court: Objection sustained.

Q. Well, now, Mr. Paine, in what physical manner would a publisher note to a purchaser of his composition if this statute were in force, the manner of payment for the public performance for profit?

A. As I understand the statute, he would have to print on the piece of music the price that he expected to get from the performer for the performance of that, and when that performer purchased sheet music with that price on it all he [fol. 446] would have to do would be to go ahead and make whatever use he wanted to make of it. That is my understanding of the statute.

Q. You have read the statute, haven't you?

A. Yes.

Q. Would the publisher have to put on the composition a price for every species and kind of performing right?

Mr. Hotz: I object to that as calling for a conclusion of the witness, and the witness speculating.

The Court: Sustained unless you put the question in some different form.

Q. Can you state from your experience how a publisher would go about to comply with this statute?

Mr. Hotz: Just a minute. I object to that as not the best evidence, and calling for a conclusion of the witness.

The Court: Overruled.

Q. Please tell us from your experience and knowledge how he would do it.

A. Well, it is a tremendously complicated thing. I think that he couldn't possibly do it, but if he attempted to, these are the things he would have to do. I am going to illustrate by taking the "Hearts and Flowers" musical composition we all know. It was published originally in piano form, and the copyright was owned by Fisher, it was an enormously [fol. 447] popular composition, so that Fisher had put it out now in a great variety of forms. "Hearts and Flowers" is published for the first grade piano student, for the second grade piano student, for violin students and in violin transcriptions, for small orchestras, for concert arrangements,

and for large orchestras and bands. That would mean that in every particular one of those manifold forms in which that single composition is published they would have to put the price on of what they wanted for the performance of that particular form, and to sell it in the State of Nebraska they would have to require a report made from every single person publicly performing music, and I should think, under oath, of what music they actually perform, of where they purchase that music, and of what they paid for it at the time that they purchased it, in order to make sure that the performance fee had been paid at the time that the purchase was made. They would have to carry out an inspection.

Mr. Hotz: Just a minute. I object to further answer. I think the witness has answered the question.

The Court: He may proceed.

A. You ask whether the publisher could fix one price for all performances. To me it would be an enormously inequitable thing if he attempted to do it.

Mr. Hotz: Objected to as not responsive, and calling for a [fol. 448] conclusion of the witness.

The Court: The portion "enormously inequitable" may be stricken out.

Q. Would he have to fix one price for a dance hall?

Mr. Hotz: I object to that as calling for a conclusion of the witness.

The Court: Overruled.

A. He would have to fix one price for a dance hall, one price for a radio broadcasting, he would have to fix one price for use in motion picture theatres, he would have to fix a price for the organization that was going to perform it every night in the week, and the organization that was going to perform it once a month, so that as far as I have been able to see there would be pages printed up in connection with each piece of sheet music setting out the schedule of prices in connection with that.

Q. And would that entail additional costs in printing up the additional sheet music?

Mr. Hotz: I object to that as calling for a conclusion of the witness, and incompetent.

The Court: Overruled.

A. It would entail additional costs, and in addition to that the statute—

Mr. Hotz: Just a minute. I object to the witness volunteering. The question has been answered.

[fol. 449] The Court: Sustained.

Q. What would the cost be?

A. Well, on the present scale of printing, if it were an additional four pages, it would run twenty-one dollars a thousand—that is the union rate.

Q. So that the cost of publishing the composition would be materially increased?

A. Very materially increased.

Q. Wouldn't the publisher also have to withdraw all compositions now in the State of Nebraska if he wanted to assure himself of receipts from the performing rights?

Mr. Hotz: I object to that as calling for a conclusion of the witness, and not within the issues of this case.

The Court: Overruled.

A. The present sheet music now in the hands of the dealers in the State of Nebraska doesn't have that price on it. They would certainly have to withdraw all that.

Mr. Hotz: I move to strike out that portion of the answer, "They would certainly have to withdraw all that".

Mr. Frohlich: That is consented to.

The Court: It may go out.

Q. Has the publisher any control over the dealers in the State of Nebraska today with respect to copies that have been heretofore purchased from the publisher?

[fol. 450] Mr. Hotz: I object to that as calling for a conclusion of the witness, and not within the issues, and immaterial, whether he has any control over them.

The Court: Overruled.

A. The dealer has purchased that and is the owner of that property, and we have no control over that property.

Q. In addition to all these things you have described, Mr. Paine, what other steps would the publisher have to take to protect himself to see that he received the receipts from the public performance for profit of the compositions sold within the State of Nebraska?

A. He would have to develop an elaborate investigation service and system. He would have to have inspectors call on the various establishments to see that the music they performed was music they had actually purchased, and in order to do that it would take a very enormous and very elaborate system of investigation.

Q. As a practical matter, from your knowledge of the operations of the Society and business of the publishers, how many investigators would the publisher have to have in the State of Nebraska for that purpose?

Mr. Hotz: I object to that as calling for a conclusion of the witness, and highly speculative.

[fol. 451] The Court: It is speculative, but he may answer.

A. Well, there are three hundred and ninety-one different establishments. Some of those operate every day, some of them operate once a week, and some of them operate once a month. Those that operate every day would have to be called on every day. Those that operate once a week would have to be called on once a week, and those that operate once a month would have to be called on once a month, in order to make the investigation, and I don't see how that work could be done with less than thirty investigators in this state. I wouldn't attempt to do it with less than that.

Q. Have you been able to find anything in the statute which permits the publisher's representative in the State of Nebraska to walk into any establishment and demand the right to see a particular composition and see whether or not the purchase price has been printed on it, and whether purchased from the publisher with that price on it?

Mr. Hotz: Objected to as calling for a conclusion of the witness. The act speaks for itself.

The Court: Objection sustained.

Q. Don't many of the orchestra leaders and little band leaders in the State of Nebraska purchase their music from jobbers outside of the State of Nebraska?

Mr. Hotz: The witness is not shown qualified to answer. [fol. 452] The Court: Objection sustained.

Q. Would the publishers have to employ counsel in the State of Nebraska to protect their rights against infringement?

Mr. Hotz: Objected to as calling for a conclusion of the witness.

The Court: Objection sustained.

Q. Tell us, please, under this statute how would a publisher protect himself against infringement in the State of Nebraska.

Mr. Hotz: I object to that as calling for a conclusion of the witness.

The Court: Objection sustained.

Q. Do the publishers make a practice of printing up so-called professional copies?

A. They do.

Q. What do they do with those copies?

A. They send those copies gratis to persons engaged in the public performance of musical works. Not all persons, but a select group of persons; those in key positions.

Q. Do publishers send those copies into the State of Nebraska as well as other states?

A. Undoubtedly.

Q. Now, under the statute what would the publisher have to do with respect to these professional copies?

Mr. Hotz: Objected to as calling for a conclusion of the witness.

Mr. Frohlich: It is important to show, your Honors, [fol. 453] the publisher couldn't give anybody a professional copy any more.

The Court: Read the question.

(Question read.)

Mr. Hotz: Renew my objection. Objected to as calling for a conclusion. The publisher could do whatever he wanted to do. If he wanted to give the public performance rights away, that is his business.

The Court: He may answer.

A. He would have, if he wanted to collect fees, to discontinue sending professional copies to the orchestras and other performers in the State of Nebraska.

Q. Would that affect the ability of the little orchestra and the little band leader to continue in business in the State of Nebraska and give his performance in this State of Nebraska?

Mr. Hotz: Objected to as calling for a conclusion of the witness.

The Court: Objection sustained.

Q. Now, you heard Mr. Buck testify here, Mr. Paine, that from time to time certain musical compositions are restricted by the publishers with respect to public performance for profit?

A. That is right.

Q. Now, he testified that a great many of those compositions [fol. 454] were songs that were contained in light operas and musical comedies and other stage productions. That is right, is it?

A. Yes, sir.

Q. Could you tell us whether a publisher could restrict a composition under this statute?

A. No.

Mr. Hotz: Just a minute. I move to strike out the answer, and object to the question as calling for a conclusion of the witness.

The Court: The answer may be stricken out, and the objection sustained.

Q. Now, assuming that this statute prevents the restriction of these compositions, what would a publisher have to do in order to protect himself against the public performance for profit of a composition which is contained either in a motion picture or display?

Mr. Hotz: Objected to as calling for a conclusion, a legal conclusion. The witness has not shown himself competent to answer.

The Court: Overruled.

A. The publisher would have to do one of two things, either refuse to grant any performance rights or put the price so high for the purchase that it would not be purchased for performances.

Mr. Hotz: Just a minute. I move to strike out that, "it [fol. 455] would not be purchased for performances". The witness doesn't know anything about it, and calling for a conclusion.

The Court: Motion denied.

Q. Take the average piano edition of a popular composition, the kind that a girl and boy walk into the store and

purchase and take home and play at the piano, would the publisher, if he sold that piano composition in the State of Nebraska, and if he tried to comply with this statute, be compelled to put on that composition the price for public performance for profit?

A. Yes.

Mr. Hotz: I move to strike out the answer, and object to it as not a proper question. The act speaks for itself.

The Court: The answer may be stricken out, and the objection is sustained.

Q. Would it be possible for a publisher to sell a single composition of any kind, shape, manner or form in the State of Nebraska without putting on it the public performance right for profit price if he tried to comply with this statute?

Mr. Hotz: The same objection, and calling for a conclusion of the witness.

The Court: Objection sustained.

Q. Now, about how many compositions would you say are contained in the catalog of a firm like Irving Berlin, Incorporated?

[fol. 456] A. In the neighborhood of ten thousand.

Q. So that if the publisher were to comply with this statute, and if Irving Berlin, Incorporated, wants to sell its compositions in the State of Nebraska for the purpose of public performance for profit, they have to file each one of those compositions with the Secretary of State of the State of Nebraska under the statute?

A. Yes, sir.

Q. And pay a fee of twenty-five cents on each composition?

A. Yes, sir.

Q. Which means they have to pay at once twenty-five hundred dollars if they want their compositions available in the State of Nebraska, isn't that right?

A. Correct.

Q. Could a publisher economically do that, considering the business he does in the State of Nebraska?

Mr. Hotz: Objected to as calling for a conclusion of the witness.

The Court: Sustained.

Q. Would the payment of that twenty-five hundred dollars affect the price charged by the publisher for the composition in the State of Nebraska?

Mr. Hotz: The same objection; calling for a conclusion of the witness, and argumentative.

The Court: Objection sustained.

Q. In your dealings with the broadcasters and under your [fol. 457] contracts with the broadcasters, has the American Society the right to audit the books of the broadcasters from time to time?

A. They have.

Mr. Hotz: Object to that because the contract speaks for itself, and they are here in evidence.

Mr. Frohlich: Withdraw the question.

Q. Pursuant to the contracts between the Society and the broadcasters does the Society from time to time audit the books of the broadcasters?

Mr. Hotz: It is same thing. He is trying to reach the same result through another question. Object to that as calling for a conclusion of the witness, and the contracts are the best evidence.

Mr. Frohlich: I haven't asked for anything in the contracts.

The Court: You asked "pursuant to the contract". Objection sustained.

Q. Does the Society audit the books of the broadcasters?

A. It does.

Q. Has that been done since 1932?

A. Yes; twice.

Q. And has the Society from time to time found deficiencies in the reports given to it by the broadcasters?

[fol. 458] Mr. Hotz: Objected to as immaterial and not the best evidence, and too general and speculative, what they found.

The Court: Overruled.

A. It has.

Q. Have the deficiencies been in substantial amounts?

Mr. Hotz: I object to that as not the best evidence.

The Court: Read the Question.

(Question read).

The Court: Overruled.

A. They have been in very substantial amounts—a deficiency of over seven hundred thousand dollars in the first audit, and the second audit not quite complete shows a deficiency of four hundred and thirty-eight thousand dollars to date.

Mr. Hotz: I move to strike that out as nothing to show any application to any parties to this suit in the State of Nebraska.

The Court: It may stand. I don't think the details should have been given.

Q. Have there been any deficiencies found in the State of Nebraska?

A. Yes.

Q. Can you tell us generally what amounts were found?

A. I wouldn't want to do that without having my records here.

[fol. 459] Q. Is the Society compelled to employ these auditors on a yearly basis?

A. Yes.

Q. These men do nothing but go around from station to station making an inspection of the books and reporting to you?

A. Correct; all certified public accountants.

Q. Do the printed catalogs of the publishers contain all of the compositions or copyrights owned by the publishing houses?

Mr. Hotz: I object to that as the witness has not shown himself competent to answer. We have a number of those catalogs here in evidence. They are depositions of the publishers taken, and they have spoken on that subject. This man is not a publisher.

The Court: I think he has shown a general knowledge of it. Overruled.

A. No, they do not. They show the current—the things that have current public acceptance.

Q. Each of these publishers own a great many copyrights that are very old, is that right?

A. Yes, sir.

Q. And when these musical compositions or copyrights have outlived their usefulness and no longer are in de-

mand, the publisher doesn't include them in his catalog, as a rule, does he?

[fol. 460] A. No, sir.

Q. So that any catalog supplied by any publishing firm to your own knowledge, would never be quite complete because it wouldn't include these very old compositions?

A. That is true.

Mr. Frohlich: You may cross examine.

Cross-examination.

By Mr. Hotz:

Q. You spoke about some popular pieces of music re-arranged or written by composers not members of the American Society, and yet they are very popular, and one of them that you gave, I think, was the "Beer Barrel Polka", is that what it is called?

A. That is what it is called, yes, sir.

Q. Who owns the public performance right on that in its present form?

A. It is owned by Shapiro & Bernstein.

Q. Are they members of the American Society?

A. They are publisher members of the American Society.

Q. So that the American Society receives remuneration from the playing of that piece of music?

A. Yes.

Q. Even though the man that wrote it or composed it is not a member of the American Society?

A. Even though the man who writes it is not a member [fol. 461] of the American Society. In its original form it is available outside of the American Society license.

Q. What about the "Snow White" score?

A. That is published at the present time by Irving Berlin, Incorporated.

Q. Of course, Irving Berlin is a member of the ASCAP?

A. That is true.

Q. Through that source the ASCAP controls all the public performance rights?

A. That is right.

Q. And receives remuneration in the State of Nebraska when it is played in the State of Nebraska through that source?

A. That is right.

Q. Now, you had one other piece I think you mentioned, one or two others.

A. I mentioned "My Dear Miss Duchesne".

Q. What about that?

A. That is now published but I have forgotten whether it is by Witmark or Remick.

Q. Both, of course, are members of your organization?

A. Yes. In its present form it is available under the American Society license. In its original form it was available outside of the American Society license. I think I mentioned "My Reverie", Claude DeBussy's work, is in the public domain in the United States and available to everybody.

[fol. 462] Q. As originally written?

A. As originally written.

Q. What about the rearrangement?

A. It is now rearranged by Robbins, and that company has published a rearrangement and it is available under the American Society license.

Q. Has there ever been any rearrangement of the "Star Spangled Banner"?

A. No, but there has of "Yankee Doodle".

Q. Who publishes that?

A. The most popular arrangement of "Yankee Doodle" is published by Carl Fischer and made by M. L. Lake, and in the last analysis that we made it was performed by radio broadcasting 8 thousand times in a year.

Q. And Carl Fischer is a member of the American Society?

A. Yes.

Q. Through that you get public performance rights?

A. Correct. But "Yankee Doodle" anybody can play.

Q. You mean they can if they could get the original manuscript?

A. No; anybody. There are plenty of public domain publications of "Yankee Doodle"—hundreds of them.

Q. These musicians, singers, players, orchestra leaders, and so forth, must have music to perform, and they buy that through the publisher and jobber and so forth, wherever they get it?

A. The Century Edition can get all the Yankee Doodles [fol. 463] that are public domain, but if you like M. L. Lake's arrangement you pay the American Society.

Q. The purpose of sending out these professional copies that go out is to get the orchestra leaders and the people that play music to use the piece of music that is published by a certain publishing house, to get the trade and business?

A. To get the public to like it. The minute they like it, it has commercial value.

Q. Until it is played and used and the people hear it, they know nothing about it?

A. Not just hear it; they must like it.

Q. They can't like it until they hear it?

A. That is true.

Q. You did say something about "A Tisket A Tasket", one of the songs you gave.

A. I did remember saying that.

Q. That is a very popular piece?

A. Very popular.

Q. Who has the arrangement on that?

A. I think that is published by Bregman, Vocco & Cohn, but you can get "A Tisket A Tasket" in the non-copyrighted edition from the Ascher Publishing Company.

Q. But through the publisher you first mentioned the American Society receives the public performance rights?

A. On "A Ticket A Tasket"—if you use that one, yes.

Q. Now, when a charge is made by the American Society [fol. 464] for the public performance rights in the State of Nebraska to the radio stations, it is based, is it not, upon a certain percentage of their gross income?

Mr. Frohlich: I object to that. The contract speaks for itself; it shows how.

Mr. Hotz: That is a preliminary question. It does, and there is no doubt about that; there is no question about that, Mr. Frohlich, that is the way it is done.

Mr. Frohlich: Certainly there is a question about it, because your question is incorrect. We have nothing to do with the gross sales or business. The five per cent contract shows what we get.

Q. Now, Mr. Frohlich has just stated that—we will take WOW for example—they pay five per cent; WOW pays the American Society, for the public performance rights, five per cent for the time on the air. Let's have an explanation from you as to what that means, just very briefly, "time on the air"; what does that mean?

A. That means for the use of the facilities of the station for broadcasting purposes.

Q. By anybody?

A. By the advertiser.

Q. So when you speak about the Lang-Worth catalog, if WOW were using that catalog or any other catalog and [fol. 465] they received income for time on the air, the American Society would receive five per cent of that sum of money, would you not?

A. If there was a contract between WOW and the American Society requiring that.

Q. There is such a contract, is there not?

A. There is now, yes.

Q. That is true with every other broadcasting station in the State of Nebraska, isn't that right?

A. Yes, every station. We expect them to live up to their contracts, if that is what you mean.

Q. What they use or did on their time on the air, you get five per cent of it under the contracts now in existence in the State of Nebraska?

A. Correct.

Q. Excepting political speeches?

A. Correct; and religious programs.

Q. Now, unless they were paid for, they would be free, those programs?

A. That is right.

Q. I think the contract shows there is also a sustaining fee, is there not, that is paid in addition by each of the broadcasting stations?

A. That is correct.

Q. And that varies in accordance as these contracts will show?

A. Yes.

Q. Now, what about the news towers of the various broadcasting stations that are put out; that is part of their time on the air, is it not?

A. Yes, sir.

Q. You get five per cent of that?

A. Yes, we get five per cent of all.

Q. Of all?

A. Of all the time on the air.

Q. Of the gross?

A. Yes. We make our repertoire available to every program they put on. If they don't use it, they don't have to.

Q. You don't have any copyrights on the news, of course?

A. No, but our catalog is available to that program.

Q. But whether it is used or not, it is five per cent of the time?

A. That is up to the station, whether they use it or don't use it; we have no control of that.

Q. Under your contracts they are required, local broadcasting stations in Nebraska are required, to have complete protective contracts with the network?

Mr. Frohlich: I object to that.

Mr. Hotz: I will withdraw the question. It is in the contracts.

Q. Let us take, for example, a dance hall in the State of Nebraska, a tavern or hotel or restaurant that has to employ an orchestra that plays music, and they pay that American Society a certain sum of money per year in accordance with these contracts mixed up in plaintiffs' Exhibit Number 16, the amount that is paid is a fixed sum per year, no matter what music they play at the dance or whether they play any of your music or not. If they do, that contract provides they shall pay you so much per year in accordance with the terms of the contract?

A. If they don't use any of our music, they don't have an American Society contract.

Q. But the price they pay per year, speaking now of a dance hall—

Mr. Frohlich: (Interrupting) I object to that.

Q. (Continuing) —or a hotel or a station of any sort that uses any music of the American Society and have a contract with you, they pay in accordance with that sum, irrespective of the amount of American Society music they might use or might not use?

Mr. Frohlich: Just a moment. I urge my objection, your Honors, please.

The Court: I presume that is all determined by the terms of the contract?

Mr. Frohlich: It is here.

The Court: Objection sustained.

Q. In the State of Nebraska is there a difference in the contracts with the radio stations if they own a newspaper and those that do not own a newspaper?

[fol. 468] A. I would have to see the contracts. There are some newspaper contracts. There are some few in the United States that are different than the regular commercial contracts.

Q. We have asked in this case that you produce a copy of the contract with the Norfolk station.

A. It is there some place.

Mr. Hotz: I didn't ask you to give me a whole handful of three hundred and ninety contracts; I asked you for that specific contract.

Q. One general question, Mr. Paine. In the newspaper owned radio station isn't the plan to charge them for the amount of American Society music they use, just the American Society music they use?

A. No; there are two hundred and sixty-some newspaper owned stations. Fifty-nine stations have what is known as the newspaper contract; the other two hundred and one have the regular commercial contract, but in those there is a difference.

Q. Would you tell us that difference to save time?

A. In the newspaper contract they give us a minimum annual guarantee, and in consideration of that minimum annual guarantee they are required to pay a percentage on the programs which use ASCAP music, and not on all programs. That is the only difference.

Q. You don't know whether that contract—

A. (Interrupting) I don't know whether this station has [fol. 469] that kind of a contract or not. I wouldn't know that unless I looked at it.

Q. The stations that do not fall under that classification and don't have a newspaper connection or ownership, they pay on everything, their whole gross income?

A. That is their income, but they have no minimum annual guarantee.

Q. Of course, you don't receive any public performance rights on income from dramatic programs, do you?

A. I don't know what you mean.

Q. I mean ordinarily now that is not covered by the American Society license, the dramatic productions?

A. If a radio advertiser buys time on the air and performs a drama, the American Society gets a license fee whether he uses music or not. That is up to him; our music is available to that program.

Q. Now, this deficit you talk about in Nebraska, I think you stated you were not able to give any definite figures in connection with that.

A. I can't.

Q. A deficit in what, just generally? I want to find out because I want to answer that with my witnesses. What are you driving at?

A. The contract calls for a certain definite sum of money that ought to have been paid us for the use of our music.

Q. Based on gross receipts according to the terms of the [fol. 470] contract?

A. When the audit was made we found that sum which the contract called for wasn't paid. The difference of what was paid and should have been paid was a deficit.

Q. You have no figures on what that happened to be, or what station in Nebraska, or when it was?

A. I could get those very readily.

Mr. Hotz: I don't think it is material, but I want to get your ideas on what it was.

Q. Now, you gave us some ideas on your direct examination of the workability of the Nebraska statute, and the Court allowed you to answer a few questions in that regard. I just want to put one or two general questions along that line. If the composer of the music and the publisher that he went to to have his music marketed, that is, put into marketable form, agreed upon a public performance fee that they wanted as between that composer and his publisher, and they sold that music within the State of Nebraska in accordance with the understanding that the composer and his publisher had, then there would be no necessity for the American Society in connection with any activity that it might have in the State of Nebraska in connection with that particular catalog?

Mr. Frohlich: I object to the question; it is hypothetical, and the statute speaks for itself.

[fol. 471] The Court: Objection sustained.

Q. I have asked this question many times with other witnesses, but I will have to ask it once more. You say that the catalogs that are made up by the different publishing houses, they might be required to be filed with the Secretary of State under one of the sections of the bill?

Mr. Frohlich: I object to that. There is no provision in the act of filing catalogs.

The Court: Let counsel finish his question.

Q. (Continuing:) Of course, it goes without saying that it would be within the province of the publisher to file such as he wished for sale in the State of Nebraska, popular music and those that had the current use in this state?

Mr. Frohlich: We object to that question. It is hypothetical and attempts to construe the statute. The statute speaks for itself. And furthermore, it is based on something not in the record or in this statute.

The Court: Objection sustained. Put it in some other form.

Q. On your direct examination counsel took as an example Irving Berlin's catalog, and we have Irving Berlin's catalog here in these depositions. You said that it contained some ten thousand pieces of music; you said that there were some in there that were not up to date or had no commercial value or commercial use, isn't that right?

[fol. 472] Mr. Frohlich: I object to that because he didn't say that.

Q. What did you say?

Mr. Frohlich: He said those were not in the catalog.

The Court: Let's not coach the witness. He probably knows what he said.

Q. I understood you to say, Mr. Paine, that in a catalog like Irving Berlin's there would naturally be quite a number of pieces that had no present commercial value.

A. But in the catalog, if you use that catalog meaning the whole group of copyrights which he owns, in the printed catalog, what I said was that he didn't include those musical compositions which are old and gone and on which there is no commercial value.

Q. In other words, the publisher-members of your organization attempt from time to time to publish an up to date catalog that is usable?

A. That they believe is of interest to the public—that they still like.

Q. Exh. at Number 11 in the deposition, for instance, is one of them that is attached to one of the depositions in this case?

A. My glasses don't let me see that far.

Q. That is what I am talking about, there (indicating).

A. That is the Irving Berlin printed catalog.

[fol. 473] Q. By the way, you are the Mr. Paine, are you not, that was referred to by Mr. Buck yesterday when we inquired in connection with your position and your salary and so forth in connection with the American Society?

A. That is correct.

Q. And the Mr. Mills that was on the stand prior to your coming on the stand, was the Mr. Mills referred to by Mr. Buck in connection with his connection and his salary and so forth?

A. That is correct.

Q. I want into the record at this time, if you can give it, generally, Mr. Paine, the Board of Directors. They are set forth in the pleadings, but I just want to ask you who these directors are. The record doesn't show.

A. It is on the back, I think. Don't they show them on the back page?

Q. We will go through with this quickly. Who is Fred E. Ahlert?

A. He is a writer.

Q. Louis Bernstein?

A. A publisher.

Q. Saul Bernstein?

A. General manager of Irving Berlin.

Q. J. J. Bregman?

A. He is the president of the firm of Bregman, Vocco & Cohn, music publishers.

Q. Irving Caesar?

[fol. 474] A. He is a writer—"Tea for Two".

Q. Max Dreyfus?

A. Max Dreyfus is the president of the Crawford Music Company and Shapiro & Company, publishers.

Q. George and Walter Fischer?

A. George Fischer—they are not related—George Fischer is the president of the firm of J. Fischer & Bros., about a seventy-five year old music publishing house, publishing fine standard music—Deems Taylor's works.

Q. And Walter Fischer?

A. He is president of Carl Fischer, Inc., a very old publishing company; John Philip Sousa's works.

Q. Otto A. Harbach?

A. Professor Harbach is a writer of drama and of the librettos of operas; he wrote "Smoke Gets Into Your Eyes".

Q. Raymond Hubbell?

A. He is a writer composer of "Poor Butterfly".

Q. Jerome Kern?

A. He is a writer and a great one.

Q. He is a publisher too?

A. Not a publisher.

Q. Edgar Leslie, he is a writer?

A. Yes.

Q. Is George W. Meyer a writer?

A. Yes.

Q. Jack Mills?

[fol. 475] A. Mills Music Company, Inc.

Q. Edwin H. Morris is the manager of Harms?

A. He is not there any more. He has resigned since, and Mr. Herman Starr is there.

Q. He is identified with which big company?

A. With Harms, Inc.

Q. That is probably the biggest publisher of any?

A. That isn't the biggest publisher; that is the biggest catalog of used music. The biggest publisher is Theodore Presser by all odds, but there is so much in his catalog that he is touching music of that sort which is not used so greatly. But Harms has the greatest music catalog in the American Society repertoire.

Q. John O'Connor?

A. He is the president of the music publishing company, "Words and Music", owned by Fred Waring and Paul Whiteman.

Q. J. J. Robbins?

A. He is head of the Robbins Music Company, which controls Robbins, Fiest & Miller Music Companies.

Q. They are all big publishing companies in New York?

A. Yes, sir.

Q. Gustave Schirmer?

A. He is president of the oldest publishing house in the United States.

Q. In the world?

A. Not in the world. Gustave Schirmer, Inc. is a great [fol. 476] publishing house.

Q. Oley Speaks?

A. He is a writer—"The Road to Mandalay".

Q. Deems Taylor is a radio broadcaster and announcer?

A. And a composer of opera and symphony, and the composer of the most beautiful chamber music—"Through The Looking Glass".

Q. He is not a publisher?

A. He is not a publisher.

Q. Will Von Tilzer?

A. He is a publisher and president of the Broadway Music Corporation.

Q. That is also a big concern?

A. Not a big concern. Neither is "Words & Music" a big concern.

Q. Joseph Young?

A. He is now dead. He was a writer and wrote a great song that we remember, "Mammy".

Q. Has anyone taken his place, and if so, whom?

A. Not yet. There is a vacancy on the Board.

Q. That vacancy will be filled by the Board itself?

A. Yes, sir.

Q. It will choose somebody, and there will be a writer to come in to take his place from among the writer members?

A. That is right.

Q. Referring to your statement of seven hundred thousand [fol. 477] dollars deficit in the accounting of broadcasting stations in the United States, you are including in this so-called deficit, are you not, sums which you claim should be paid by the stations that are called "free hours to networks", are you not?

A. Yes, surely.

Q. Tell us a little bit about "free hours to networks".

A. Well, I don't know why this is germane, but I don't mind telling you.

Q. I am only asking you because you talked about a seven hundred thousand dollar deficit, and the Court let it go in.

A. All right.

Q. Let's have a little more about it.

A. Now, the broadcasting stations originally when they entered into contracts with their stations that were going to be hooked up to make the chain, required the station to pay to the broadcaster fifteen hundred dollars a month for the use of sustaining programs which the central stations supplied to the chain station. When we collected five per cent from the station, we collected five per cent on that fifteen hundred dollars because that was a receipt obtained

by the station for the use of its facilities. Subsequently the chains entered into a new kind of arrangement whereby they said, "You don't have to pay us this fifteen hundred dollars any more. In lieu of the fifteen hundred dollars you give us a certain number of free hours." By that they meant, [fol. 478] "Let us broadcast an advertising program over your station for an hour or sixteen hours a week and not pay you anything for those." So we say—

Q. Let me interrupt.

Mr. Frohlich: Let him finish. I think a man is entitled to finish his answer.

Mr. Hotz: I think he has answered what I have called for.

The Witness: There is fifteen hundred dollars; the value of those free hours is fixed at fifteen hundred dollars.

Mr. Hotz: I object to that as argumentative.

The Witness: It isn't argumentative; it is a fact.

Q. That was a matter between the network and the local station was it not, made between the network and the local station?

A. Absolutely.

Q. Now, then you come in as the American Society and say you want your pay based upon those free hours?

A. They fixed the price of them; we didn't.

Q. There is some dispute and difference of opinion that has arisen on the interpretation of their license agreements in that regard?

A. Not as to all stations. There are a great number of stations that have raised that question. Why, I don't know, because it is very clear they are wrong.

[fol. 479] Q. The networks do not pay the American Society for the chain broadcasts as a network?

A. They pay each station so much money. The stations collect from the advertiser a total amount of money, and pay each individual station for the station time, and we collect from the station. The stations don't broadcast chain broadcasts for nothing.

Q. Now, is this seven hundred thousand dollars deficit you speak of, is that represented largely by this difference of opinion that I have spoken about with reference to this free time?

A. No; twenty per cent of it.

Q. And, of course, the provisions of that license contract, and in reference to this free time, and so forth, has never

been interpreted by any court decision or anything of that sort?

A. Oh, no; it is clear—there is no use suing them.

Mr. Hotz: That is all.

Redirect examination.

By Mr. Frohlich:

Q. Taking at random one of the broadcasting contracts between the Society and a broadcaster in Nebraska, the Omaha Grain Exchange, this contract provides that computing time on the air for which the Society charges five per cent, the broadcaster may deduct the advertising agency [fol. 480] fee or commission, as they call it here, not exceeding fifteen per cent. Do you know of your own knowledge whether that fifteen per cent is the usual charge to broadcasters or advertisers by these agencies throughout the country?

A. That is the standard percentage charged by advertising agencies for service that they render to the advertiser.

Q. When Chase & Sanborne put Charlie McCarthy on the air, Chase & Sanborne pays to the broadcaster a fixed amount, let us say five thousand dollars, or what it happens to be, and from that five thousand dollars there is deducted a commission of fifteen per cent, which is turned over to an advertising agency, isn't that right?

A. Correct.

Q. And that is prevalent throughout the entire business?

A. Yes, sir.

Q. By bringing the advertiser into it, the studio receives three times as much as the American Society for its entire repertoire, doesn't it?

Mr. Hotz: Objected to as leading and asking for a conclusion.

The Court: That is a matter of mathematics. Objection sustained.

Mr. Frohlich: That is all.

Mr. Hotz: That is all.

Witness excused.

[fol. 481] ERNEST PRIESMAN was called as a witness on behalf of the complainants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. State your full name.

A. Ernest Priesman.

Q. What is your occupation?

A. I am in the orchestra business.

Q. You conduct an orchestra?

A. I have an orchestra.

Q. Do you reside in the State of Nebraska?

A. Yes, sir.

Q. Where?

A. Omaha, Nebraska.

Q. Now, how many years have you conducted an orchestra?

A. I have been connected with orchestras for the past ten years.

Q. Have you played at any of the hotels in Omaha?

A. Yes, sir.

Q. Have you played recently?

A. Yes, sir.

Q. How many men do you employ in your orchestra now?

A. Well, in the present orchestra, nine people.

Q. Including yourself?

[fol. 482] A. Yes, sir, including myself.

Q. Do you purchase music for distribution to your orchestra?

A. Yes, sir, I have occasion to.

Q. Do you also receive professional copies?

A. Indirectly I receive some professional copies.

Q. About how large a library of music do you maintain?

A. Well, the dance library we use usually consists of one hundred tunes.

Q. In addition to a dance library do you have a vocal library?

A. There are some standard things we carry, but the vocal library is included with the regular music.

Q. So that you have to have one hundred orchestrations, I take it?

A. We usually carry that along on each job, yes, sir.

Q. Do you get a good deal of that for nothing?

A. In our particular case, we don't get a lot of it for nothing. We get part of it for nothing.

Q. What proportion of the library you carry do you obtain gratis?

A. I would say in our particular case maybe ten to fifteen per cent is sent in through hotels as professional copies.

Q. Where do you purchase your music?

A. At various music stores, mostly right in Omaha, and sometimes we send out for it.

Q. Do you purchase any from jobbers?

A. At present we purchase right from the Lyon & Healy [fol. 483] retail store in Omaha.

Q. Have you ever purchased any music from any jobbers by mail?

A. I have had occasions to.

Q. How many musical compositions do you perform of an evening?

A. It would depend if it was a dance engagement or what type of engagement you are referring to. On a three-hour dance I would say we play dances in sets of ten at a dance, and if ten at a dance, approximately three tunes to a set.

Q. You also play encores and request numbers?

A. Of course.

Q. When you come into an establishment like the Hotel Paxton, does the proprietor have anything to do with the selection of the musical compositions, or do you do it yourself?

A. We do that out of the pieces we have there, and the requests given to us.

Q. The proprietor doesn't have to do anything about that?

A. Seldom.

Q. You, yourself, as an orchestra leader have never received a license from the American Society of Composers, Authors and Publishers, have you?

A. No, sir.

Q. And no other orchestra leader, so far as you know, has applied for or obtained such a license?

A. None I know of.

Q. You rely on the fact that the place in which you play is a licensed establishment?

[fol. 484] A. Yes, sir.

Q. When you purchase a composition for your orchestra, you can't use an ordinary piano copy, can you?

A. Not for your orchestra.

Q. You have got to have an orchestrated edition which contains music for each particular instrument in that orchestra?

A. Yes.

Q. What do you usually pay for an entire set of orchestrations?

A. From fifty to seventy-five cents.

Q. That covers the entire band, doesn't it?

A. Yes, sir.

Q. If you were compelled to purchase this music for your orchestra, and you were compelled to pay a performance price in addition to the price of the sheet music, could you profitably conduct your business?

Mr. Hotz: Just a minute. I object to that as calling for a conclusion of the witness. There is nothing in here about his earnings or anything of the sort. It is immaterial.

The Court: Overruled.

A. I would say in answer to that, at the present wage scales and prices it wouldn't be profitable. The cost has to be passed on to the customer.

Q. In other words, the additional cost of performing rights would have to be paid by yourself in the first instance?

A. Yes, sir.

[fol. 485] Q. And then you would have to get it by extra salary from the hotel?

A. It would have to be paid by the direct employer.

Q. Who employs your orchestra?

Mr. Hotz: Objected to as calling for a conclusion of the witness, and highly speculative who it would be paid by. It would depend on the negotiations.

The Court: Sustained.

Q. Do you keep any log or record of your performance?

A. As to which numbers we play?

Q. Yes.

A. No, sir, not in general.

Q. Are you familiar with the method or manner of conducting a business with other orchestras in the State of Nebraska?

A. I would say in general I do, yes, sir.

Q. Do they keep logs of the compositions or records of the particular numbers they play?

A. I don't believe they do as to what they play during each evening, unless it would be radio time or something of that kind.

Q. You say you play encores or request numbers. Is that customary in the modern dance entertainment?

A. It absolutely is—it is part of good business.

Q. In other words, after you have played a number, somebody in the audience may come along and say, "We would [fol. 486] like to have you play such a number", and you play it for them, if possible?

A. Yes, sir.

Q. You don't have to worry or make any attempt to find out who owns the copyright of such a request number, do you?

Mr. Frohlich: Withdraw the question.

Mr. Hotz: Let him answer the question.

A. We don't usually; we never have.

Q. If you had to play an evening's entertainment from music on which you had paid a performance right within the State of Nebraska, would you be able to play encores or request numbers?

A. It would be very, very difficult if we had to check everything.

Q. You first would have to check up and see if you had the music and had paid the price on it, is that right?

A. Yes, sir.

Q. When you purchase a sheet of music are you able to tell at that time in what kind of establishment you are going to perform in in the future?

A. I wouldn't say we would necessarily think of that or know definitely.

Q. What I mean is this, Mr. Priesman, you play in hotels occasionally, don't you?

A. Yes, sir.

Q. And dance halls?

[fol. 487] A. Yes, sir.

Q. And other places of entertainment and amusement for the public?

A. Yes, sir.

Q. You don't know at this time where you are going to play six months or a year from now, do you?

A. No, sir.

Q. And if you purchase a sheet of music which had on it a list of various prices for various forms and method of entertainment, and various kinds of public performance for profit, could you, as a practical matter and practical use, in advance, say that you are going to purchase music for this and this kind of entertainment, could you do that?

A. I wouldn't say, as a practical matter, you could do that.

Q. Would a statute which compelled you to purchase music under those conditions enable you to continue in business?

Mr. Hotz: Just a minute. I object to that as calling for a conclusion of the witness.

The Court: Objection sustained.

Mr. Frohlich: That is all.

Cross-examination.

By Mr. Hotz:

Q. About how much is your orchestra paid by week by an establishment which employs you and your eight or nine assistants?

A. On a weekly engagement, by the week?

[fol. 488] Q. Yes.

A. That price scale varies.

Q. At the Fontenelle Hotel, for example, have you ever played there?

A. Yes, sir.

Q. How much did you get?

A. I have never played steady engagements at the hotel. I have played at other hotels, and incidental engagements.

Q. What other hotels have you played at?

A. Paxton Hotel.

Q. How much did you receive for a week's engagement there?

A. Well, at the present time the price scale for side men run about a dollar and a quarter an hour on a thirty-hour week.

Q. How many men do you have?

A. Nine people; eight musicians and a vocalist.

Q. How much would that figure up for the week?

A. About three hundred and fifty dollars in round figures, I believe—that is what we are required to get.

Q. That is, the men?

A. Yes, sir.

Q. Now, the hotel makes a contract with you as the leader of the orchestra, does it not?

A. The contract at present is made with us acting as their agent to secure the services of musicians associations. We are their agent to secure music. In other words, [fol. 489] they are the employer, and we as contractors are not considered the employer, the way the contract is stated. It is very technical.

Q. And, of course, that includes the music that is played on the program, that three hundred and fifty dollars a week, that covers, naturally, the sheet music and orchestrations you use or your singers sing on that program, isn't that right?

A. It does at present, yes, sir.

Q. How many different hotels have you played in, in the past year, in the State of Nebraska?

A. As a steady engagement?

Q. I am not concerned about that.

A. In Omaha, I have played at the Blackstone, Fontenelle, Paxton and Rome, and all the first class hotels.

Q. Have you played any in Lincoln?

A. Yes, sir.

Q. Where?

A. The Cornhusker Hotel and the Lincoln Hotel, I believe—those were party dates, single engagements.

Q. Any out in the state?

A. Yes, sir.

Q. Where?

A. Played at Fremont, Nebraska, at Lincoln, Nebraska—I couldn't tell you over the exact last year. Since I have been in the business the last couple of years, it has included [fol. 490] Beatrice and Hastings, and all of the danceable towns.

Q. In the hotels?

A. If there are hotels, and sometimes in dance halls, and business in general.

Q. Mr. Priesman, do you know of any place where there is a record kept of number of orchestras, such as yours, or like yours, in the State of Nebraska, in operation in the state for playing music?

A. I don't know of any records where the list of organized bands are listed.

Q. Do you know of your own personal knowledge about how many there are in the State of Nebraska?

A. I am sorry, I couldn't say.

Q. In the City of Omaha, do you know?

A. I could approximate the professional or union orchestras.

Q. How many?

A. I would say there were probably ten to a dozen in various organizations in Omaha. However, that doesn't include the number of bands that play in Omaha. There are hundreds of bands playing in Omaha.

Q. They run up into large figures, don't they?

A. Yes, sir.

Q. They come there from elsewhere?

A. Yes, sir.

Q. Sent in by booking agencies, are they?

[fol. 491] A. Sometimes they are, and sometimes they book themselves.

Q. In the last two or three years there has been quite a springing up in the demand for dance music on account of the number of dance halls and places where dancing and that sort of entertainment takes place, has there not been?

A. I wouldn't say any greater in the last two or three years. I would say in the past. You might say business has gone down—it depends.

Q. I am talking about Omaha and Nebraska.

A. I wouldn't say there was any increase.

Q. It is greater than it was five or six years ago?

A. I wouldn't say so considerably.

Q. How old are you?

A. Twenty-four.

Mr. Hotz: That is all.

Redirect examination.

By Mr. Frohlich:

Q. Do these traveling bands come from outside the State of Nebraska?

A. Oh, yes, many of them.

Q. Various bands drift into Nebraska and play for a night, or two or three, and go out again?

A. Sometimes they are territorial bands and play from night to night.

Q. You said you did purchase some of your music through [fol. 492] mail order jobbers or houses, or somehow through the mail?

A. Yes, sir.

Q. Did you purchase by mail outside of the State of Nebraska?

A. Yes, sir.

Mr. Frohlich: That is all.

Mr. Hotz: That is all.

Witness excused.

[fol. 493] HARRY ELMER TAYLOR, was called as a witness on behalf of the complainants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. State your full name.

A. Harry Elmer Taylor.

Q. Where do you reside, Mr. Taylor?

A. Omaha, Nebraska.

Q. What is your occupation?

A. Theatre manager.

Q. You manage a theatre in Omaha?

A. Yes, sir.

Q. What is that theatre?

A. The Ritz.

Q. How many years have you managed it?

A. Ten.

Q. And in that theatre do you exhibit motion pictures to the public?

A. Yes, sir.

Q. And do you also as a part of your motion picture entertainment furnish musical entertainment in the theatre?

A. No.

Q. Well, the pictures that come into your theatre have [fol. 494] music on them?

A. Yes, sir.

Q. And the music is heard by the audience when the picture is seen?

A. Yes, sir.

The Court: A sound track, you mean?

The Witness: Yes, sir.

Q. Do you also own any other place of entertainment?

A. We own the Music Box.

A. A dance hall?

A. Yes, sir.

Q. In the City of Omaha?

A. Yes, sir.

Q. A large dance hall?

A. Comparatively.

Q. About how large would the dance floor be?

A. I imagine about seventy-five by one hundred.

Q. Do you operate that dance hall?

A. Every night in the week, except Monday.

Q. In the operation of the dance hall do you avail yourself of the services of an orchestra?

A. Yes, sir.

Q. Do you do that every night?

A. Every night except Monday.

Q. How large an orchestra do you employ there?

A. Ten men plus a leader and girl singer.

[fol. 495] Q. What do you pay your orchestra weekly?

A. It varies from four hundred and sixty dollars a week to seven hundred dollars.

Q. Would you say that it would be safe to say six hundred dollars is an average price you pay for your orchestra each week?

A. Yes, sir.

Q. That would be at the rate of approximately twenty-four hundred dollars a month?

A. Yes, sir.

Q. Do you also have a license from the American Society of Composers, Authors and Publishers?

A. Yes, sir.

Q. How long have you had such a license?

A. Since we started three years ago.

Q. What do you pay the Society per month under the license?

A. Twenty dollars a month.

Q. Have you a license with the Society for your theatre?

A. Yes, sir.

Q. What do you pay the Society for your theatre?

A. Sixty dollars a year.

Q. In giving your entertainment in your Music Box do you keep a record or log of the particular compositions played there nightly?

A. No, sir.

Q. You rely solely upon your license with the Society?
[fol. 496] A. Yes, sir.

Q. And when the orchestra leader comes in with his orchestra, you don't determine what pieces he is to play?

A. No, sir.

Q. You feel he can satisfy the public demands?

A. Yes, sir.

Q. Do you know whether or not there are request numbers and encores every night in the establishment?

A. Yes, sir.

Q. Do you also employ an orchestra from time to time that comes in from out of the State of Nebraska?

A. Mostly we do.

Q. Mostly your orchestras are traveling bands?

A. Yes, sir.

Q. Now, in your motion picture theatre you do not play music by means of any orchestra?

A. No, sir.

Q. It is simply that the film and sound track on the film carries with it whatever music happens to be on the film?

A. Yes, sir.

Q. And, of course, that film is leased or rented by you from distributors of motion picture films, isn't that right?

A. Yes, sir.

Q. This film comes into your place from outside of the State of Nebraska?

A. Yes, sir.

[fol. 497] Q. Of course, we all know and you know most of the films are manufactured in Hollywood?

A. Yes, sir.

Q. And find their way into your theatre and other theatres in the State of Nebraska from time to time?

A. Yes, sir.

Q. Have you any control whatever over the music played on those film tracks?

A. No, sir.

Q. And in order for you to save yourself from infringement, do you rely solely on your license with the American Society?

A. Yes, sir.

Mr. Frohlich: You may cross examine.

Cross-examination.

By Mr. Hotz:

Q. Where is the Ritz Theatre?

A. 24th and Patrick, in the City of Omaha.

Q. What is your seating capacity of it?

A. Five hundred and eighty seats, or six hundred—
along in there.

Q. Do you own the Music Box?

A. Yes, sir.

Q. Yourself?

A. Yes, sir.

Q. Where is that located?

[fol. 498] A. 19th and Capitol Avenue.

Mr. Hotz: That is all.

Mr. Frohlich: That is all.

Witness excused.

(Short Recess)

[fol. 499] MRS. ANNE PAUL NEVIN, was called as a witness on behalf of the complainants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. State your full name, please.

A. Anne Paul Nevin.

Q. Where do you reside, Mrs. Nevin?

A. I reside in New York in the winter, and Blue Hill, Maine in the summer. I don't go abroad as I used to.

Q. You are the widow of Ethelbert Nevin?

A. I am.

Q. Can you tell us what year you were married to Mr. Nevin?

A. 1889, I think it was.

Q. Was your husband a composer?

A. Yes, sir.

Q. I show you, Mrs. Nevin, a list of compositions, and ask you whether these truly represent the compositions that were composed by your husband from 1874 down to 1901?

A. He died in 1901.

Mr. Hotz: We will admit, Mr. Frohlich, that the list of publications, of musical compositions, contained in the affidavit attached to her affidavit were publications of her [fol. 500] husband, without further identification, and composed by him.

Q. Among those compositions was there a song called the "Rosary"?

A. Yes, sir.

Q. Was there a song called "Mighty Lak a Rose"?

A. Yes, sir.

Q. Did those songs become famous?

A. I think so, if you judge by the number of copies that were sold.

Q. Now, Mrs. Nevin, are you presently a member of the American Society of Composers, Authors and Publishers?

A. I am.

Q. Was your husband in his lifetime ever in receipt of any moneys for the public performance for profit of any of his compositions?

Mr. Hotz: I object to that as incompetent, irrelevant and immaterial.

The Court: I think she may answer.

Q. Did your husband ever receive any moneys for the public performance for profit of his compositions?

A. I think not.

Q. Did he receive moneys?

A. You see, he has been gone many years.

Q. Did he receive moneys from the sale of sheet music of his compositions?

A. I think so.

Q. Did he receive money from the sale and exploitation [fol. 501] of mechanical royalties?

A. I am not sure about that; I think not.

Q. So that the only substantial revenues, so far as you

know, he ever received for any of his works was from the sale of sheet music?

A. Yes, sir, absolutely.

Q. He died, you said, in 1901?

A. Yes, sir.

Q. When did you become a member of the American Society?

A. I think it was—would it be 1925?

Q. Was it 1926?

A. I can't quite remember.

Mr. Frohlich: Will you stipulate it was 1926?

Mr. Hotz: Certainly.

Q. Ever since you have been a member of the American Society, Mrs. Niven, have you been in receipt of income from the Society?

A. Always.

Q. Has that been the main source of income you have been in receipt of for your husband's works as a composer?

A. Absolutely.

Q. Do you receive any money today from the sale of sheet music from your husband's compositions?

A. I think I do. Wouldn't that be in the American Society?

Q. Do you receive any money from any publisher for the [fol. 502] sale of sheet music today?

A. I don't quite understand—I think I don't. You don't mean the publishers?

Q. I mean the publishers.

A. Well, I get some from them.

Q. Does it amount to very much each year?

A. I think so.

Q. From the publishers?

A. A good deal.

Q. Do you also receive money from the American Society?

A. Yes, indeed I do.

Q. Does the money you receive from the American Society help support you?

A. It is practically my whole living.

Q. Are you willing to give up your contract with the American Society?

Mr. Hotz: Now, just a minute. Objected to as calling for a conclusion.

The Court: Objection sustained.

Mr. Frohlich: I want to point out to the Court in order for this lady to be able to receive any money for the sale of the public performance for profit in Nebraska she must give up that contract because the statute declares this is an illegal combination.

[fol. 503] The Court: That is a conclusion, and argument.

Mr. Hotz: That is, as far as the American Society is concerned, but not as far as she is concerned.

Mr. Frohlich: The question was whether she would be willing to give it up.

Mr. Hotz: It wouldn't make any difference.

Q. Mrs. Niven, have you ever had any experience in marketing, selling or exploiting any of your husband's musical combinations?

A. I have had very little—some.

Q. Are you able to look after the business end of the exploitation of any of this music?

A. I have done it so many years, and he has many foreign royalties.

Q. If you were compelled to act for yourself, without the assistance of the American Society, could you go into the State of Nebraska and protect yourself against the infringement of your husband's compositions within that state?

Mr. Hotz: We object to that as calling for a conclusion of the witness, and not proper evidence.

The Court: Objection sustained.

Q. Have you the financial means at this time, Mrs. Niven, to employ investigators to come into the State of Nebraska and to investigate establishments to see whether or not [fol. 504] your husband's music is played?

Mr. Hotz: We object to that as incompetent, and the witness showing herself not qualified to answer that question. It is a legal question, and calling for a conclusion.

Mr. Frohlich: She knows whether she has financial means.

Mr. Hotz: That would be immaterial.

The Court: I think it is immaterial; objection sustained.

Q. Mrs. Nevin, do you know anything about the various places of amusement and entertainment where music is played?

A. Yes, I think I do.

Q. Have you any sufficient experience to place upon any of the musical compositions of your husband a price for the use of the compositions in any of these places of entertainment?

A. You mean for me to pick them over and do that? I couldn't.

Mr. Frohlich: That is all.

Cross-examination.

By Mr. Hotz:

Q. Mrs. Nevin, who is your publisher?

A. I have two publishers.

Q. Who are they?

A. The Presser people of Philadelphia and the Boston [fol. 505] Music Company of Boston, which is Schirmer of New York—of Boston; Schirmer of Boston.

Q. Now, those publishers are members of the American Society, that is, they are publisher members?

A. So far as I know, they all are.

Q. Now, in your dealings with your publisher, what man do you rely upon in the organization mostly as your agent and representative of your publishers?

A. You mean in the publishers?

Q. Yes.

A. I, of course, depend upon Gus Schirmer.

Q. You have known him for many, many years?

A. Very many years. And his father, of course, knew my husband, and he trusted him implicitly.

Q. They are one of the biggest publishers in the United States?

A. They are one of the biggest publishers in the United States, and a member of ASCAP.

Q. You receive, do you not, Mrs. Nevin, a royalty for the sale of the music?

A. Every three months.

Q. And you recall what that amounts to, about, do you?

A. I am afraid I don't. Well, you mean—you don't mean the American Society, do you?

Q. I am talking about what you get from your publisher.

A. I know I get a very good royalty, but I can't tell you the exact amount. For instance, the Boston Music Company

[fol. 506] pays me, and I don't have any contract with them; they pay me one hundred dollars a month.

Q. And then what else do you get?

A. Then, of course, the Presser people—I think most of their people they pay every six months, but I have mine every three months.

Q. How much is that?

A. It amounts to sometimes six hundred dollars and sometimes less.

Q. And then do you have other publishers too?

A. I think that is about all.

Q. Isn't there one more of Gustave Schirmer's house?

A. That is the same thing—it is the same.

Q. Now then, do you know enough about that to tell us if that is based upon so much per piece of music sold, three cents a copy?

A. I think so, it must be. I know it comes very regularly, and I am always glad to get it, and I get it, of course, through the American Society.

Q. We recognize the fact, Mrs. Nevin, that your husband's list of music is probably the greatest there is.

A. It is very great, I think. He began very early.

Q. It is used very extensively, is it now, over the radio?

A. I think so. At my husband's death, the "Rosary" sold at four hundred thousand, and now I think, according to the New York Herald Tribune, and a man in Washington, it is [fol. 507] selling in the millions. The truth is I don't know, and I don't know whether it is true or not.

Q. Who owns the rights on that, the "Rosary"?

A. Who gets it? I do.

Q. Who owns the publication rights?

A. Schirmer and the Boston Music Company and Presser, but it is all with the American Society.

Q. The public performance rights are with ASCAP? You understand, I guess, what public performance rights are?

A. Yes. I think I have signed something for it.

Q. You signed one of their contracts?

A. Yes, sir.

Q. In what classification have they placed you?

A. I think it is one of the high ones.

Q. Do you know if it is fifteen thousand dollars a year, or less?

A. I think it is fifteen thousand dollars per year.

Q. Your husband died in 1901, you say?

A. Yes, sir.

Q. Who handled your affairs in reference to all of your rights prior to 1926, including your public performance rights?

A. I think it was just in the hands of my publishers—Schirmer and the Presser Company, and at one time the John Page Company, and Presser has bought the Page Company now.

Q. You would sit down occasionally and discuss prices and terms, I presume, with your publisher?

[fol. 508] A. I am one person I think who is very close with everyone I deal with, with the publishers, all my publishers, and they even come and see me, which I think should be done by many, many people who are sometimes complaining they don't get the right royalty.

Q. Who is that?

A. It is the John Page Company, or Schirmer—I go down to see them, and the Boston Music Company, but, of course, that is Schirmer. But, of course, until the American Society came, my royalties were much lower.

Q. Your public performance rights came into an increasing amount after you became a member?

A. I think so. The truth is I know very little about the performance. The other part, I have.

Q. How long have you been in this higher class, this fifteen thousand dollar class?

A. Well, at first, of course, I didn't get so much, but some years ago they raised it. I never liked to speak of what I do get, because so many are in it, and I really never speak of it at all. It might cause a feeling on the part of those that don't get so much.

Q. You leave that entirely to the Board of Directors of ASCAP?

A. Absolutely.

Q. That is left to Mr. Buck and Mr. Mills and Mr. Paine?

A. And all the others, Mr. Mills and all of them. They have been of the greatest help to me.

[fol. 509] Q. You of your own knowledge, Mrs. Nevin, have no recollection you can give us here of the number of pieces of music that are sold for vocal and instrumental purposes by your publisher; you couldn't give us that?

A. No. I think I could get it for you, if you want it, but I couldn't just right now say offhand, because I have such

confidence in the American Society that I don't have to think one minute.

Q. That wouldn't be a part of their business; that would be Schirmer's business, the number of pieces that are sold by your publisher would be a matter between yourself and the publisher?

A. Yes, but that is all in the American Society.

Q. That part of it isn't, the royalties you get from Mr. Schirmer?

A. That is the ASCAP.

Q. You think that is the ASCAP?

A. We deal entirely with the ASCAP.

Q. That is your impression?

A. Yes; it is quite an impression.

Q. By the way, who represents you in your copyright matters in New York, what firm of lawyers?

A. I don't know any but the ASCAP.

Q. They handle that for you?

A. I think they handle everything.

Mr. Hotz: That is all.

Witness excused.

[fol. 510]

OFFER OF DEPOSITIONS

Mr. Frohlich: No further witnesses, your Honors. All I have now are the depositions that were taken.

May it please your Honors, two depositions were taken pursuant to the notice, one for depositions in New York City in the summer of 1938, and after the depositions were duly certified they came back to the Clerk of the Court, and we have them here. The other two depositions were two witnesses, Jerome Kern and Sigmund Romburg taken in California last summer, 1938, and I have a copy of them here. The originals were certified and sent back to the Clerk of the Court and the Clerk has an entry on his docket showing they were received here in 1938; but he can't find them. I was wondering if I wouldn't be permitted to use my copy, subject to correction; it is a carbon copy. I suggest this in order to save time, because I realize these depositions are quite voluminous. I would like to offer them all to the Court in evidence as if the witnesses were testifying, subject to the objections that were made by opposing counsel,

and your Honors may rule on that when you come to the depositions. I think it would serve no useful purpose for [fol. 511] me to stand up for a day and read them.

The Court: Wouldn't it be better if you offered in evidence the depositions of stated witnesses taken under this notice or commission, together with the cross examination, subject to all objections?

Mr. Hotz: I call your Honors' attention to the fact that the cross examination of these various publishers is a material part of our case, we figure. There are objections made in connection with some of that testimony, and I am trying to figure out in my mind how to facilitate matters, but at the same time we want that cross examination.

The Court: Why not have the depositions offered and received subject to objections?

Mr. Frohlich: Both as to direct and cross examination.

Mr. Hotz: What I am getting at is, suppose some parts of this cross examination the Court would say was not proper, and if that is the case, in connection with some of these depositions, some of this cross examination, I want to supply other proof of the same thing.

The Court: Could you not offer it on testimony, if not proper cross examination?

[fol. 512] Mr. Hotz: But I wouldn't know it if you are going to take these away.

The Court: You can cover it in the statement to the record if you desire, in the event the Court holds that any of these objections are not cross examination. In that event, you desire and now offer that part of the cross examination as your own testimony. I am suggesting that.

Mr. Hotz: That will do it; that is satisfactory, I think.

Mr. Frohlich: I am willing to waive any objection. The whole record can be in as far as I am concerned, everything they elicited can come into this record, and all exhibits. The exhibits are mostly mine. These are my depositions. I am willing to withdraw any objection to any part.

The Court: The record may show that any and all objections interposed on cross examination on the ground that it is not proper cross examination, is waived by counsel.

Mr. Frohlich: Yes, your Honors.

I offer in evidence the depositions taken pursuant to notice in the City of New York of the witness Sigmund Spaeth, with all of the exhibits that were submitted, iden-

[fol. 513] tified and offered by both sides, and with all of the cross examination, subject to the stipulation already made, in which I have withdrawn any objection to the cross examination on the ground it is not proper cross examination.

Mr. Hotz: What about the other objections?

Mr. Frohlich: The Court can pass on the immateriality.

I make a similar offer of proof as to the direct testimony and the cross examination and all the exhibits, and the same waiver of objection on my part, of the witness Abraham Schwartz who was business manager of Irving Berlin, Inc.

I also make the same offer with respect to the testimony of Walter S. Fischer, president of Carl Fischer, with respect to the direct testimony and to the cross examination and the exhibits, and the same waiver of objection.

I also make the same offer with respect to the witness Irving Caeser, with respect to the direct examination and cross examination and all the exhibits, and the same withdrawal of objection and waiver.

I also make the same offer with respect to the deposition of Edwin H. Morris, with respect to the direct testimony, [fol. 514] the cross examination, the exhibits, and the waiver of objection.

I make the same offer with respect to the testimony of George W. Meyer, with respect to the direct testimony, the cross examination, the exhibits, and the waiver.

I make the same offer with respect to the witness Ella Herbert Bartlett, with respect to the direct testimony, cross examination, the exhibits, and withdraw all objections.

I make the same offer of proof with respect to the witness Will Von Tilzer, with respect to the direct testimony, the cross examination, all of the exhibits, and the same waiver of objections.

I make the same offer of proof with respect to the deposition of Edgar Leslie, with respect to the direct testimony, the cross examination, the exhibits, and the waiver of objections.

With respect to these witnesses I now state they are not within the State of Nebraska.

I make the same offer of proof with respect to the witness Jerome Kern, and Sigmund Romberg, taken in the State of California in 1938, and I make the same offer with respect to the direct testimony—there was no cross examination and no one representing the Attorney General's office in that

[fol. 515] deposition—and also ask that the exhibits be marked in evidence.

Mr. Hotz: My attention, may your Honors please, has been called to the form of this stipulation on the depositions that were first suggested, and that is that the withdrawal of the objections was limited.

Mr. Frohlich: No; as I understand it, the only limitation was as to whether or not it was proper cross examination. I think the Court has a right to pass the materiality and irrelevancy of a matter, which it is cross examination or direct.

Mr. Hotz: The only objections you have raised in your cross examination is the fact that it is not proper examination. Is that the only thing you waive, or not?

Mr. Frohlich: What else do you want us to waive?

Mr. Hotz: The rest of your objections.

The Court: The question as to materiality?

Mr. Hotz: Aside from the question of materiality there are other things here.

Mr. Frohlich: I waive every form of objection except the competency, materiality and relevancy.

[fol. 516] Mr. Hotz: That won't do.

Mr. Frohlich: I will give you competency; I don't care about that. But I think materiality and relevancy should be in there. I can't burden the Court with a lot of stuff that doesn't belong here. There were very few objections taken by us. That matter of objections, do you want everything to go in on both sides; have the objections withdrawn on both sides?

Mr. Hotz: No. These were your witnesses.

Mr. Frohlich: Certainly. I am willing to have a clean slate, everything to go in on both sides.

Mr. Hotz: Not at all. I am not going to waive the reading of these depositions at all.

Mr. Frohlich: I am trying to save time, that is all.

The Court: Have you made your offer?

Mr. Frohlich: Yes.

The Court: Is there any objection?

Mr. Hotz: Yes.

The Court: What is it?

Mr. Hotz: We object to the offer in reference to the cross-examination that has been offered because the stipulation in connection with waiving of the objections is not

[fol. 517] broad enough to cover the situation, and it postpones the ruling of the Court, your Honors, on the cross-examination until after the close of the case.

The Court: Do you wish to offer your cross-examination yourself?

Mr. Hotz: Yes, we would like to offer our cross-examination.

The Court: Offer it.

Mr. Frohlich: I will consent to have it come in.

Mr. Hotz: Offer the cross-examination of each of the witnesses in which the direct examination has been offered by Mr. Frohlich.

Mr. Frohlich: We consent to it.

The Court: The direct and cross-examination of the witnesses as shown by these depositions is received.

What else?

Mr. Frohlich: I just want to make the statement, your Honors, that all of the witnesses mentioned in these depositions reside out of the state, more than one hundred miles from this state, and they are not available for trial at this time, and not within one hundred miles of this court.

[fol. 518] The Court: I guess there is no objection.

Mr. Frohlich: With that, your Honors, the plaintiffs rest.

Mr. Hotz: In connection with the status of the record on these depositions, let the record show that these witnesses were, of course, the complainants' witnesses; in our offer of the cross-examination it isn't our intention in the manner in which these offers have been made, that the defendant should be bound by the statements made of those witnesses, excepting in reference to the matters on cross-examination.

The Court: You offer that as cross-examination and not otherwise?

Mr. Hotz: As cross-examination and not otherwise.

Mr. Frohlich: The plaintiffs rest.

(Whereupon, at the conclusion of the complainants' evidence, the defendants, in order to maintain the issues on their behalf to be maintained, presented the following evidence.)

Mr. Hotz: Might I read these cross-examinations?

The Court: I don't want you to take the time to read them [fol. 519] if we can avoid that.

Mr. Frohlich: I thought, your Honors, we had settled that.

The Court: Probably either side will state substantially what it contained and what their claim is with reference to the proof of these depositions. We wouldn't like to have you offer the cross-examination and read it without the other, because you announce your offer as only the cross-examination.

Mr. Hotz: We will pass it for the time being.

The Court: All right.

Mr. Hotz: The record shows there were a number of interrogatories propounded in accordance with the terms of the statute to the others, and they answered a large number of those interrogatories and supplied the information that was wanted. On balance of them the various witnesses stated that they would have it present here in the court room the day called for, if the Court ruled that it was material. There are sixty-three of those interrogatories. At this time I would like to read those interrogatories. I don't see how we can avoid that.

The Court: Very well.

[fol. 520] Mr. Frohlich: We can avoid it if I consent to them. I will consent that we could dispense with the reading of these interrogatories. There are four sets of them, and I will consent to have everything in there go in that is in. I objected to some of the interrogatories because I felt they were improper and asked a thing they were not entitled to. As to those, we can have a ruling of the Court. I have given them a tremendous amount of material in there.

The Court: Is some of it in the nature of repetition of testimony you already have?

Mr. Hotz: Some. For example, we asked for the list of the publisher members of their organization. We have got that in.

Mr. Frohlich: Whose have you got there; Bucks?

Mr. Hotz: Yes. These others are not very long; they are very short.

The Court: I assume you refer only to those you think now are material?

Mr. Hotz: Yes.

(Interrogatory Number 1 read by Mr. Hotz.)

The Court: I am wondering if it hasn't been covered pretty well by the testimony?

Mr. Hotz: Yes.

[fol. 521] The Court: Why not waive it now in view of the testimony already in?

Mr. Hotz: The purpose of that question, your Honors please, is, of course, to show the development of the Society.

The Court: That is already shown.

Mr. Hotz: No, it is not, we don't have it in there. It shows only from these exhibits here.

The Court: That is largely the testimony of Mr. Buck, isn't it?

Mr. Frohlich: They can develop that from Mr. Buck. Even Mr. Buck couldn't give them those jobs; it would be an enormous job, and would have to go back to 1914 and give them a list of the members.

The Court: Did I understand you to say you agreed they could introduce all of these and there was no objection to them?

Mr. Frohlich: I said I would agree to the present interrogatories, to all the exhibits and answers that are in there, with the exception as to those I objected to I want the Court to make a ruling. The Court will realize what my friend has asked for is a period of twenty-five years and would show nothing of a useful purpose. Mr. Buck took the stand [fol. 522] and showed great deal of the twenty-five years, and he was subject to cross-examination.

The Court: In view of the testimony already introduced and the present state of the record, the objection is sustained.

(Interrogatory Number 2 read by Mr. Hotz.)

The Court: That will be sustained.

(Interrogatory Number 3 read by Mr. Hotz.)

Mr. Frohlich: That has been answered.

Mr. Hotz: They have complied with that.

(Interrogatory Number 4 read by Mr. Hotz.)

Now, that they object to, they say.

Mr. Frohlich: Read the objection.

(Objection read.)

Mr. Hotz: Now, that asks for the list of the copyrighted musical compositions or arrangements owned or controlled by their author members.

Mr. Frohlich: That is Number 4, isn't it? Read the question again.

(Interrogatory Number 4 re-read.)

The man says he can't give it to you and doesn't know it.

The Court: Is that the answer?

Mr. Frohlich: That is the answer.

(Interrogatory Number 5 read by Mr. Hotz.)

[fol. 523] -Mr. Frohlich: That is in evidence, also.

The Court: There is no objection to this?

Mr. Hotz: No.

The Court: Why not read right on?

(Interrogatory Number 6 read by Mr. Hotz.)

(Interrogatory Number 7 read by Mr. Hotz.)

(Interrogatory Number 8 read by Mr. Hotz.)

Mr. Frohlich: That Exhibit Number 5, your Honors, is merely a part of this great big box which was not received in evidence. This is bringing that down to date. I have no objection to putting it in evidence, but we couldn't give them any more, your Honors.

Mr. Hotz: I call attention of the Court to the fact that this is what we have been given as a substantial compilation of their compositions. I call the attention of the Court to the fact that it is here.

(Interrogatory Number 9 read by Mr. Hotz.)

(Interrogatory Number 10 ready by Mr. Hotz.)

Mr. Frohlich: It doesn't say exactly that. Exhibit Number 11 has been confused with Exhibit Number 5.

(Interrogatories Numbers 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 ready by Mr. Hotz.)

The Court: Do you think there is anything disclosed by [fol. 524] these answers not fully covered by the testimony either on direct examination or cross-examination of this same witness?

Mr. Hotz: Probably not; there are one or two things. The evident purpose we had in connection with those interrogatories was to show the enormity of the thing, they

are so vast, and the very fact that they could not furnish them. We thought it might have some probative force, I suppose.

What I would like to do, if the Court will permit it, is to take these with me tonight. It is 5:00 o'clock and I am supposed to go ahead and get some witnesses down here tonight from Omaha. I believe that if I could take these and sit down——

The Court: As a matter of fact you want to continue until tomorrow morning?

Mr. Hotz: No. More than that, I will spend the time, your Honors, if you will believe me, in really going through these interrogatories and seeing if I can't simplify this thing. The interrogatories were the result of a lot of lawyers wanting to ask questions and get their ideas in. A large number of persons are interested in it, and I must confess some of those I can't answer as well as I would like [fol. 525] to, and I think if I take the time this evening I will simplify this thing by morning and come in with two or three more, and maybe none, and present them to the Court.

The Court: You have nothing else to present this evening?

Mr. Hotz: No. May I take these out of the court room?

Mr. Frohlich: There is no objection.

The Court: The Clerk will check them with you.

(Whereupon an adjournment was taken until 9:30 o'clock A. M., Wednesday, September 20, 1939.)

[fol. 526] (At 9:30 o'clock A. M., Wednesday, September 20, 1939, Court convened pursuant to adjournment, all parties present as heretofore, and the following proceedings were had, done and entered of record, to-wit:)

Mr. Te Poel: If the Court please, the Clerk called our attention this morning to the fact the State Treasurer has died within the last few weeks, who was a defendant in this case, and has been succeeded by John Havekost, the duly appointed and qualified and acting Treasurer. The complainants now move that because of the death of the defendant Bass that John Havekost be made party defendant in this action in lieu of the defendant Bass.

Mr. Frohlich: Plaintiffs consent.

[fol. 527] JOSEPH MALEC was called as a witness on behalf of the defendants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Hotz:

Q. State your name.

A. Joseph Malec.

Q. Where do you reside?

A. Omaha, Nebraska.

Q. What is your business?

A. Amusement.

Q. Do you have an amusement park in the City of Omaha or near the City of Omaha, and if so, what is its name?

A. I have a park under the name Peony Park.

Q. Where is that located?

A. It is located west of Omaha.

Q. What street number?

A. 78th and Dodge Streets.

Q. What is its business?

A. Dancing and swimming and picnicking.

Q. About how many persons attended your dance pavilion, indoor and outdoor, last year?

A. About one hundred thousand.

Q. Is there an association in the State of Nebraska of persons engaged in similar lines of business as yourself, [fol. 528] and if so, what connection do you have with it?

A. I am the president of the association of Nebraska Amusement Men's Protective Association.

Q. When was that organization formed?

A. The organization was formed in 1936.

Q. What was the purpose of its organization?

A. The purpose of the forming of the organization was to get relief from the ASCAP association.

Q. In what manner?

A. To seek relief from the power that the ASCAP exercised over all the people interested in playing music for public performance.

Q. In the State of Nebraska?

A. In the State of Nebraska.

Q. How long have you been in the amusement business?

A. Eighteen years.

Q. In your experience have you had occasion to get statistics and estimate the number of persons interested in dancing and that do dance in the State of Nebraska?

A. I would say about one-third of the population in the State of Nebraska dances.

Q. Did you organize or yourself individually have anything to do with the introduction of the bill that is before this Court, Legislative Bill No. 478?

A. Yes, I had.

Q. Just state what part you had in connection with it.

[fol. 529] A. I organized the amusement people in the State of Nebraska to form this bill. This bill was presented by Mr. Frank Brady.

Q. In the preparation and introduction of that bill through Mr. Brady did the broadcasters of Nebraska or the National Association of Broadcasters have anything to do with it; were they consulted at the outset?

A. No.

Q. Was it taken up with them at all in any way?

A. Later we asked them to join us in forwarding the bill that Mr. Brady introduced.

Q. Mr. Malec, are you an employer of music in your establishment for dancing purposes?

A. Yes.

Q. To what extent? Just about the number of orchestras and the amount of time your organization puts in in the employment of music.

A. Well, our establishment uses music during the summer time, six days a week, for a period of three months, and the rest of the year we use music twice a week.

Q. To what extent do you pay out money for orchestras and bands per annum at the present time?

A. Well, yearly we pay about fifteen thousand dollars—approximately around that figure for music.

Q. You have, do you not, an outside dance pavilion and an indoor dance pavilion?

[fol. 530] A. We have an outdoor dance pavilion and an indoor dance pavilion.

Q. Were there any other organizations at the time this bill was introduced that were interested besides yourself and your organization, and if so, who?

A. In introducing this bill we had the support of the Czech societies and of the German, and various individuals

that had something to do with the use of music directly and indirectly in the past years.

Q. Why were the Czech societies called in, if you know?

A. The Czechs have a great number of dance places throughout the state and they were interested.

Q. The same with the German society?

A. Yes.

Q. Did the theatre or motion picture operators have anything to do with it, and if so, state what?

A. I approached their association on it but they were afraid to come out openly and assist us in presenting the bill.

Mr. Frohlich: I move to strike out "they were afraid".

The Court: It may stand.

Q. Did you have any conversation with any member officially of that organization, that is, the motion picture theatre men's association, and if so, with whom and where with reference to this bill?

[fol. 531] A. I talked twice with Mr. Williams.

Mr. Frohlich: I object to any such conversation on the ground it is hearsay.

The Court: He is not giving any conversation.

Mr. Frohlich: He was just about to give a conversation.

Q. Was Mr. Williams their president?

A. Yes.

Q. Where was the first meeting held, and generally who was present at the time you undertook to sponsor a bill in the Nebraska Legislature?

A. The first meeting was held in Omaha.

Q. You were present at that meeting?

A. Yes.

Q. Were there any of the broadcasting people present at that time?

A. I called in just the dance people of the state at the time.

Q. Now, have you had any dealings with ASCAP, that is, Peony Park, Inc., and yourself personally, in the past years, and are you having any dealings with them at the present time?

A. Yes, I had dealings with the ASCAP for about eighteen years.

Q. Are you operating now under one of their licenses?

A. Yes.

[fol. 532] Q. What amount of money are you paying annually to ASCAP?

A. Two hundred and fifty dollars, I believe.

Q. Per year?

A. Per year.

Q. Who were your dealings with as far as ASCAP was concerned, what member of its organization?

A. Mr. Eugene Blazer.

Q. Now, did you operate for a time prior to your present contract without a license? Was there a time that you didn't have a license and paid them money?

A. Yes.

Q. How long a time was that, and how much did you pay them?

A. We started out years ago with the fee of sixty dollars. Then this fee was raised from time to time. Years ago there was no contract signed by us with Mr. Blazer.

Q. Did you ever have any controversy with ASCAP in connection with this amount of money that was paid by you for the public performance rights?

A. Yes, at various times I protested to Mr. Blazer about the fee asked by him for playing the music.

Q. And what did he say?

A. Well, just a statement for the yearly dues, and they said they were raised from sixty dollars to the present charge, and whenever I took it up with him as to why the added charge, well, several times he told me that I should be glad he doesn't charge me one thousand dollars; that he [fol. 533] was in charge of how much I am to pay.

Q. Did you or Peony Park or the members of your association ever take up with ASCAP in New York, or any of its Board of Directors through yourself or any national organization the matter of the terms or conditions of the contract that you now have with ASCAP?

A. No.

Q. At any time within the past few years have you refused to pay ASCAP?

A. Yes, I refused to pay them several times.

Q. And what happened?

A. I was always threatened with a suit, and I was sued on two accounts.

Q. In the United States District Court at Omaha?

A. Yes, sir.

Q. For infringements?

A. Yes, sir.

Q. And those suits were dismissed, were they?

A. Yes.

Q. And you signed the contract?

A. Yes.

Q. Now, why did you sign the contract with ASCAP?
Why do you deal with them at all?

Mr. Frohlich: I object to that as calling for a conclusion, and speculative.

The Court: I think he may answer. You brought out [fol. 534] proof that it wasn't necessary; that they had public domain to draw from.

A. Just couldn't get along without the music, so there was nothing else for me to do but sign.

Q. Do you know about what percentage or amount of the kind of music that your organization uses is controlled by ASCAP through the public performance rights?

A. Well, I have been told by Mr. Blazer that practically all the music is controlled by the ASCAP.

Q. Speaking now of popular dance music?

A. Yes.

Q. And of your own personal knowledge, what are the facts as you have found them?

A. I think he speaks the truth.

Q. At the time this bill came on for hearing in the legislature do you know whether or not there were public hearings held before various legislative committees in connection with it, and before its final passage, or not?

A. Yes.

Q. Did you attend any of those meetings?

A. Yes, I did.

Q. Did you have an opportunity to observe whether or not other persons attended it, and if so, generally who, without going into too much detail?

A. Going over the bill before the committee, the assembly hall was filled to capacity, and I know that there was great [fol. 535] interest among many people that traveled a long distance to be there at that meeting, from various points.

Q. That lived in Nebraska?

A. That lived in Nebraska.

Q. Was ASCAP represented at those hearings?

A. Yes.

Q. And did they present their side of the matter?

A. Yes, they did.

Q. Do you know whether the matter was debated on the floor of the Legislature before the bill was passed?

A. Yes.

Q. Did you hear it?

A. Yes.

Q. You were present?

A. Yes.

Q. You heard the various sides presented by various legislators?

A. I did.

Q. Do you know what the final vote on the bill was?

Mr. Frohlich: I object to that.

The Court: Sustained.

Mr. Hotz: Did I understand that counsel objected on the ground of incompetency, and if so, I will concede that?

The Court: As I understand it, there was no objection at all. The bill was passed and I don't think it makes much [fol. 536] difference how much majority it had.

Q. When you employ music, Mr. Malec, what control do you exercise as a proprietor over the musicians in regard to the style and kind of music they play?

A. I exercise no power over the music that the orchestra brings along when they play their engagement.

Q. How do you negotiate with your musicians?

A. Well, some bands are booked directly, and some bands we get through their bookers.

Q. Booking agencies?

A. Booking agencies; yes.

Q. The point I want to bring out, Mr. Malec, is whether or not if these musicians are individual musicians or employees of yours, and do you pay each one separate or do you just give a check to the booking agency or to the band leader for the contract price for the term that they play?

A. The men are never individually paid. The pay goes to the contractor or the leader of the orchestra.

Q. You do not control the amount of money each individual musician gets?

A. No, I don't.

Q. Would you be able to run and operate your establishment in the State of Nebraska without music?

A. I couldn't do that—I would have to have music.

Q. Would you be able to run and operate your establishment without ASCAP?

[fol. 537] Mr. Frohlich: I object to that as not qualified, and highly speculative. The witness is not qualified to testify to that.

The Court: Overruled.

A. I could not run without the music of ASCAP.

Q. What is the principal objection you have, Mr. Malec, in your dealings with ASCAP? What are you complaining about, what is the chief difficulty and why did you organize and have this bill introduced in the State Legislature; what is the trouble?

A. I felt that the unlimited power exercised by the representative was detrimental and unjust to the business, and dangerous.

Q. In what manner?

A. The attitude and position Mr. Blazer took in telling me that he would have the right and power to ask one thousand dollars as a fee for a park to pay.

Mr. Frohlich: Can you fix the time and place of that conversation?

The Court: About the time and place.

The Witness: Oh, Mr. Blazer made statements of that type several times in the past years.

Q. When did he make them?

A. He would always make them at a time when we would get into—about the time when he was sending us a statement and I would refuse or argue this fee with him, telling him we had difficulties these days to carry on our business, [fol. 538] and he would take the attitude that we were very fortunate that he wasn't charging us more.

Q. Do you have an opportunity at the present time to deal openly for music with any other persons that you know about, any publisher or catalog or anything of that sort?

A. Well, at the present time I don't know if I could deal with anybody else as long as we are paying this fee to ASCAP.

Q. I didn't have that so much in mind, Mr. Malec; I said do you desire to select your music from the catalogs of dif-

ferent publishers and choose your own style and class of music? Would you like to do that?

A. Yes, I would prefer that.

Q. And are you able to do that now under your arrangements with ASCAP?

A. I don't think so.

The Court: Mr. Malec, do you know of any competitors of this ASCAP organization who are in the market with music for musical selections?

The Witness: I don't.

The Court: Have you been solicited by representatives through the mail or in person or music concerns offering to sell music?

The Witness: About three years ago I received a letter from Warner Bros. They were telling me in the letter that [fol. 539] they wanted a fee of a hundred and fifty dollars from the Park for playing music—their music, but at that time we just ignored the letter, and there was nothing more heard by us from Warner Bros.

Q. When was that?

A. I would say about three years ago.

Q. What was the result of that, if you know? Did you get any notification in connection with that matter from ASCAP?

A. No. I received a letter from Warner Bros.

Q. What did they say?

A. They were telling me they were divorcing themselves from ASCAP, and they wanted us to pay them a hundred and fifty dollars for playing their music.

Q. I mean after that did they go back in ASCAP?

A. I understand they did.

Q. You never received any more letters from them, anyhow?

A. No.

Q. How many members of your organization are there in the State of Nebraska?

A. About two hundred and forty.

Q. You are speaking now of the Amusement Men's Protective Association?

A. Yes.

Q. Of which you are president?

A. Yes, sir.

[fol. 540] Mr. Hotz: I think that is all.

Cross-examination.

By Mr. Frohlich:

Q. Mr. Malec, when did you go into business in Peony Park?

A. Oh, I had Peony Park for about twenty-four years.

Q. You were there in 1921?

A. Yes.

Q. Did I understand you to testify you paid ASCAP moneys, but never had a contract in the early days?

A. There were some days we did not have a contract.

Q. Did you have a contract in 1921?

A. I could not say.

Q. I show you this document and ask you whether you recognize the signature?

A. Yes.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 42.

Q. It is your signature?

A. It is "Malec Bros." on there.

Q. In your handwriting?

A. Yes, sir.

Mr. Hotz: Objected to as immaterial.

The Court: Overruled.

Q. You had a similar contract in 1922, did you? Look at this document and look at the signature and see if it is yours?

[fol. 541] A. Yes, sir.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 43.

The Court: Is there any reason for encumbering the record with that? It is similar to others.

Q. Mr. Malec, under this first contract, plaintiffs' Exhibit Number 42, you paid thirty dollars a year, is that right? Look at it.

A. I thought it was sixty dollars—I had forgotten.

Q. And under your second contract in 1922 you paid fifty dollars a year, didn't you?

A. Yes.

Q. Your business was growing, wasn't it?

A. Yes.

Q. You don't want this Court to believe that you were as large an establishment in 1921 and 1922 as you are today?

A. No.

Q. You were a small dance hall in those days, weren't you?

A. Well, we have done a lot of business during the summer time.

Q. Did you employ orchestras in those days at substantial salaries?

A. No.

Q. How did you furnish music to your patrons?

A. We had to pay for the music.

Q. How did you operate the music, by what means; with an orchestra?

[fol. 542] A. With an orchestra.

Q. A small orchestra?

A. Well, nine to ten pieces.

Q. In those days?

A. Yes, sir.

Q. What did you pay the orchestra, on the average?

A. Well, in those days five to six dollars a man a night.

Q. How much would that run into a week or month?

A. Ten men would be fifty-five dollars, something like that, a night.

Q. It would be about three hundred dollars a week?

A. Yes, sir.

Q. Fifteen thousand dollars a year?

A. Well, around those figures.

Q. You increased your business as you went along, didn't you?

A. Some years we did, yes.

Q. What admission did you charge in 1921?

A. One dollar a couple.

Q. And on the average how many people came into your establishment a week?

A. Well, in those days we danced four nights a week.

Q. You only operated four nights?

A. Four nights.

Q. And how many people came in of an evening?

A. Well, anywhere from, say, sixty couples up to two [fol. 543] hundred and fifty or three hundred couples on Saturday night.

Q. Do you now operate on four days a week?

A. We now operate two nights a week.

Q. In the summer time, how do you operate?

A. Operate ~~six~~ nights a week then.

Q. In winter time?

A. Two nights a week.

Q. What do you charge admission now?

A. Forty cents a person.

Q. Eighty cents a couple?

A. Some nights thirty cents; some nights forty cents; Saturdays, fifty cents.

Q. How many people come into your establishment on a week night?

A. Again, it will run probably one hundred couples and up to four or five hundred couples on Saturday nights; six hundred couples sometimes.

Q. What gross business did you do in 1921 and 1922 and 1923 and those years, approximately?

A. I couldn't recall that.

Q. Well, did you do as much as twenty-five thousand dollars a year?

A. I say that is going pretty far back—I don't know what business we did do.

Q. Have you no recollection of what you did in 1925, 1926 or 1927?

[fol. 544] A. I wouldn't want to say the figures.

Q. Well, you testified you now do about one hundred thousand a year, is that right?

A. One hundred thousand attendance a year, one hundred thousand paid customers.

Q. Did you do one hundred thousand attendance in 1921 and 1922?

A. No.

Q. You did considerably less, didn't you?

A. Yes.

Q. Your business increased over the years, isn't that right?

A. Yes.

Q. And from time to time Mr. Blazer asked you to pay larger sums, didn't he?

A. Yes.

Q. You knew there were other dance halls in and around Omaha? You are familiar with the territory, aren't you?

A. Yes.

Q. You know you have competitors in this territory, isn't that right?

A. Yes.

Q. You know you have some large competitors and some small competitors?

A. Right.

Q. You knew right along the large dance halls were paying more than the small dance halls, isn't that right?

[fol. 545] A. Yes, sir.

Q. You expected they should pay that, didn't you?

A. I didn't expect them to pay, the small ones.

Q. Well, didn't you expect a small dance hall to pay proportionately, and a larger dance hall to pay more?

A. Yes. Some paid, and some didn't pay anything at all.

Q. You had a large dance hall, didn't you?

A. Yes.

Q. You were one of the leading dance halls in the State of Nebraska, isn't that right?

A. That is true.

Q. You charge an admission to the Park in addition to the dance floor, don't you?

A. Yes, sir.

Q. What do you charge now?

A. Ten cents in the summer time. Now, the season is over.

Q. So that a customer has to pay you ten cents, twenty cents a couple, to get in the Park, and eighty cents to dance; that is one dollar, isn't it?

A. Tuesday nights they pay twenty cents to get in the Park, and get in to dance for fifty cents; that makes seventy cents a couple.

Q. Now, you said on Saturday nights you have had as many as four hundred people in the place?

A. Four hundred couples.

Q. That would mean an increase, approximately, between three and four hundred dollars, isn't that right?

[fol. 546] A. Yes.

Q. The chief expense is the orchestra, isn't it?

A. Yes.

Q. You still pay about fifteen thousand dollars a year for that orchestra, is that right?

A. Yes.

Q. You also sell refreshments in the Park?

A. Yes.

Q. And you make a profit out of that?

A. We hope to.

Q. You sell drinks?

A. Yes.

Q. And sell food?

Mr. Hotz: You don't sell hard liquor, do you?

The Witness: No.

Q. You sell beverages and food?

A. Yes.

Q. Now, you organized this Amusement Protective Association of Nebraska, didn't you?

A. Yes.

Q. When did you organize it?

A. 1936, I think.

Q. Now, before you organized that, did you have any correspondence with any other body or association regarding ASCAP?

[fol. 547] A. I had a lot of conversation with men operating different places.

Q. Did you have any correspondence with anybody on the subject?

Mr. Hotz: Just a minute. I object to that unless counsel states with whom.

Q. That is what I am trying to find out.

The Court: Overruled.

A. I don't think so.

Q. Did you get any letter from the National Association of Broadcasters?

A. No.

Q. Did you get any letters from anybody representing the National Association of Broadcasters?

A. None prior to our organization.

Q. Well, did you get them after the organization?

A. No.

Q. Did you get them at any time?

A. I don't believe we had any correspondence from the broadcasters.

Q. Who prepared the bill presented to the Nebraska Legislature?

A. Mr. Brady.

Q. Who is he?

A. One of the Representatives, State Representatives.

Q. Did you ever see the bill before it was presented?

A. Yes.

Q. Where and when?

[fol. 548] A. I seen it before it was presented, of course.

Q. Who showed it to you?

A. Between Mr. Brady and myself and a lot of other people interested in the bill.

Q. And then did you in March, 1937 circularize the members of your Protective Association with reference to the bill?

A. Yes.

Q. I show you a document and ask you whether that is the document you sent out to your members?

A. Yes, that is one of them.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 44.

Mr. Hotz: Objected to as immaterial.

The Court: Overruled.

Q. Do you remember this part of the letter, "Our first big problem is the promotion of the bill 478 which will protect us against the payment of the so-called license to play copyrighted music at public performances for profit. We have been forced to pay the American Society of Composers, Authors and Publishers long enough, and we believe that if we all do our part we will be able to keep this graft out of the State of Nebraska." Do you remember that?

A. Words to that effect.

Q. You dictated this, didn't you?

A. Yes, sir.

Q. This was a form of graft in your estimation, wasn't it?

[fol. 549] A. That is what it says there.

Q. You were paying two hundred and forty dollars a year for this graft, weren't you?

A. Yes.

Q. You were paying fifteen thousand dollars for an orchestra, weren't you?

A. Yes.

Q. The orchestra played music for you at each performance for your patrons?

A. Yes, sir.

Q. For two hundred and forty dollars graft that you were paying you had a license to a great many musical compositions, didn't you?

A. That is what Mr. Blazer said.

Q. Nobody ever sued you for a copyright, did they?

A. I was threatened practically every year.

Q. Were you threatened by anybody outside of the American Society for infringement of a copyright?

A. No.

Q. You never paid a cent of damage for infringement of a copyright, did you?

A. No.

Q. As a matter of fact, you didn't bother your head about the music you were playing in your establishment?

A. Yes, sir.

Q. Well, you left it to the orchestra leader, didn't you?
[fol. 550] A. Yes.

Q. You import a lot of bands outside of the state?

A. Yes, sir.

Q. You still do that?

A. Yes, sir.

Q. You just gave the orchestra leader carte-blanche and told him to go ahead and play what he wanted, didn't you do that?

A. Yes, sir.

Q. Are you a musician?

A. No.

Q. Do you know anything at all about music?

A. Some.

Q. Did you ever keep a log or record of the pieces you played?

A. No.

Q. Did you ever tell your orchestra leader to confine himself to any particular kind of music?

A. I told him the tempo of music I would like to have him play.

Q. You told him you wanted dance music?

A. Yes, sir.

Q. And you left it to his discretion what he would play?

A. Yes, sir.

Q. Did you ever look at the sheets of music to see who owned the copyrights?

A. Oh, I believe I looked at some sheet music.

Q. When?

[fol. 551] A. Occasionally if I get around to see what number they are playing.

Q. Didn't a time come when you discontinued paying ASCAP any money for a license?

A. Yes.

Q. And you were sued for infringement by Mr. Blazer on behalf of the members of ASCAP?

A. Yes, sir.

Q. That one suit went on for how long a period?

A. Well, the suit was started but it wasn't finished.

Q. How many months did it drag along?

A. Well, it was during that time we were introducing that bill, probably three months.

Q. During those three months you were not paying ASCAP a penny, were you?

A. No. It was all pending.

Q. During that three months you were running your establishment, weren't you?

A. Yes, sir.

Q. While running the establishment you were having an orchestra play music?

A. Yes, sir.

Q. During those three months when no license from ASCAP was had, did you take the trouble to investigate the kind of music being played in your establishment?

A. No.

[fol. 552] Q. Didn't you know as a matter of fact that a great many compositions played belonged to members of ASCAP?

A. I think they did.

Q. You knew that. It didn't make any difference to you, did it?

A. Not at the time, no.

Q. Did you pay anybody for that music?

A. I think I settled it afterwards.

Q. Did you pay any author, composer or publisher a penny in all your life outside of ASCAP for the use of any music in your establishment?

A. No.

Q. Did you ever make an effort to find out whether any author, composer or publisher had his music played in your establishment? Did you ever make any effort to find that out?

A. Oh, I was told that the music was all handled——

Q. (Interrupting:) Did you ever make an effort to find out who owned any music in your establishment?

A. No.

Q. Did you ever make an effort to pay any composer, author or publisher a license fee for the use of music in your establishment?

A. No.

Q. Assuming that the ASCAP cannot do business in this State under the present law, and you want to continue running your business, how would you go about protecting yourself against infringement suits? What would you do?

[fol. 553] A. Well, if the whole State of Nebraska was situated as I would be, I don't think it would make much difference.

Q. What would you personally do to protect your business establishment and your investment if there were no ASCAP today?

A. I don't know. I think I am at the mercy of ASCAP.

Q. Suppose you wouldn't be at the mercy of ASCAP and there was no ASCAP in the State of Nebraska, what would you do about furnishing music to your patrons? Would you still have an orchestra?

A. I don't know what I would do.

Q. In other words, if there were no ASCAP you couldn't run your business, isn't that right?

A. I guess that is right.

Q. Would you make any attempt to get music from other sources?

A. I would have to.

Q. Have you ever made any attempt in your life to get music from the public domain or music that belonged to others than ASCAP?

A. No, I didn't.

Q. Now, if there were no ASCAP and you wanted to perform this music, you wouldn't want to infringe on anybody's rights, would you?

A. No.

Q. You are a law abiding citizen, aren't you?

A. Yes, sir.

[fol. 554] Q. And want to do business legally and properly?

A. Yes, sir.

Q. And if there were no ASCAP in the State of Nebraska or anywhere, what would you do to protect yourself against infringing on somebody's rights with respect to music?

A. Well, we would have to play music that ASCAP has nothing to do with.

Q. Well, whose music would you play?

A. I believe there would be some authors come forward contributing their knowledge to the musical world.

Q. Now, you know there are a great many compositions that are not copyrighted, don't you?

A. I think there are some, yes.

Q. And as to the compositions that are not copyrighted by members of ASCAP, you would have to negotiate separate licenses with these people, wouldn't you?

A. We would have to buy music that we know doesn't belong to ASCAP.

Q. And you would have to negotiate separately with the owners of copyrights for the privilege of playing the music, wouldn't you?

A. I think our orchestras would have to.

Q. Either you or the orchestra?

A. Yes, sir.

Q. How many numbers do you play in a night?

A. Probably thirty-five.

[fol. 555] Q. You play about thirty-five numbers one night, and play some of the same numbers the next night. How many numbers a week?

A. Multiply that by six—two hundred numbers, but most of them are repeated again.

Q. Would it be fair to say between one hundred and two hundred numbers?

A. Yes.

Q. If there were no ASCAP and you had to negotiate with respect to one hundred to two hundred numbers each week, how would you have to commence your negotiations?

A. I don't think it would be necessary to have as many numbers.

Q. Suppose you cut it down a half, you would have to negotiate for some reasonable time prior to the performance in your establishment, wouldn't you?

A. I expect so.

Q. You would have to employ somebody for that, wouldn't you?

A. Oh, I think things would work out somehow.

Q. Would you, yourself, be willing to give up your time for negotiating a license for music in your establishment?

A. No, I wouldn't have the time for that.

Q. You would have to employ somebody for that purpose, wouldn't you?

A. Yes.

Q. You would have to pay a salary for that, wouldn't you?
[fol. 556] A. I expect so.

Q. What would you think you would have to pay some man in your establishment to clear your copyrights?

A. Well, Peony Park wouldn't want to go into the music business.

Q. You wouldn't want to go to too big an expense?

A. No.

Q. But if no ASCAP, and if you had to clear the rights, wouldn't you have to employ somebody at a substantial salary?

A. If there were no ASCAP, I think the state would get some music—you could get a great deal of music.

Q. Isn't it a fact that today with ASCAP there is a great deal of music which doesn't belong to ASCAP?

A. I don't know how much music I could get today. I was told by Mr. Blazer that ASCAP controls practically all the music.

Q. He told you that?

A. Yes, sir.

Q. Did you make any effort to find out whether that was true or not?

A. He told me they controlled about a million and a half numbers.

Q. A million and a half numbers?

A. A million numbers, yes.

Q. Did you ever make any effort to find out whether there was any other music outside of ASCAP?

[fol. 557] A. I expect there are some musical compositions not controlled by ASCAP.

Q. You know there is, don't you?

A. The popular music is all controlled by ASCAP.

Q. You didn't make any effort because you didn't have to?

A. That is right.

Q. The ASCAP license protected you, didn't it?

A. I was on the payroll.

Q. For that two hundred and forty dollars you got complete protection against all infringement?

A. Yes, sir.

Q. And you feel you did?

A. Yes, sir.

Q. You were never bothered or paid any damages?

A. Right.

Q. You felt that paying two hundred and forty dollars against fifteen thousand dollars for an orchestra, was graft?

A. Yes, sir.

Q. You said that?

A. Yes, sir.

Q. You still feel it is?

A. Yes, sir; I feel it is unjust.

Q. In other words, you wouldn't want to pay anything for it?

A. I would want to pay it some other way.

Q. How would you want to pay it some other way, and what way?

A. In such a way that no man could tell me he can charge [fol. 558] me whatever he wants and I have to pay it, or else.

Q. Well, did Mr. Blazer ever ask you for one thousand dollars for a contract?

A. He said he could ask me.

Q. He didn't tell you he wanted you to pay it; he didn't tell you he wanted you to pay one thousand dollars?

A. He told me I ought to pay one thousand.

Q. Did you ever make a contract for one thousand dollars?

A. No.

Q. He told you he could charge one thousand dollars, isn't that right?

A. Yes, sir.

Q. He never asked you to pay one thousand?

A. No.

Q. You never paid one thousand dollars?

A. No, I never paid one thousand dollars.

Q. You were very resentful every time he increased your rates over the years?

A. Right.

Q. You argued with him bitterly about it?

A. Yes.

Q. In all these years did he jump your rates very high?

A. I asked him for a reduction the last three years, because business was not what it was four or five years ago, but I couldn't get it.

Q. What do you take in a year in dollars and cents, this [fol. 559] last year, 1938?

A. We lost money in 1938.

Q. Did you lose money in 1937?

A. We made some money but not very much.

Q. How much did you make?

A. We made about four thousand dollars net.

Q. What was the gross amount of money you took in in 1938 in dollars and cents, approximately?

A. I don't know. We probably took in around seventy or eighty thousand dollars.

Q. And you say out of the seventy or eighty thousand dollars you lost money?

A. Yes.

Q. Did you draw a monthly salary?

A. Yes.

Q. What did you draw?

A. Three hundred dollars a month.

Q. Thirty-six hundred dollars a year?

A. Yes, sir.

Q. Did any other member of your family draw any money out of that company in 1938?

A. Yes.

Q. Who?

A. My brother.

Q. How much?

A. The same amount.

[fol. 560] Q. Between you, you drew out seven thousand dollars in the way of salaries out of the business?

A. Yes, sir.

Q. Did anybody else draw any money out of the business?

A. We have sixty-five people working for us.

Q. You say you lost money on the gross business that year?

A. 1938, yes.

Q. In 1937 did you draw a similar amount?

A. Yes.

Q. Did your brother draw the same amount?

A. Yes.

Q. You made four thousand dollars in addition?

A. Yes, sir.

Q. In 1936 what was the gross business you did in that year?

A. Somewhere near the same figure.

Q. You had the same drawings?

A. Yes.

Q. Did you make any money that year?

A. A little.

Q. How much?

A. Four or five thousand dollars.

Q. As a matter of fact, you have been making a profit in addition to your drawings practically every year, haven't you?

A. In that we have swimming and other things.

Q. Taking everything into consideration in that Park, [fol. 561] you have been making money there, haven't you?

A. Some, yes.

Q. You have been running that park for over twenty years, and it is a profitable business today, isn't it?

A. Not today.

Q. Would you say in 1939 it was unprofitable for you?

A. I don't know how this will be, but not very profitable, I don't believe.

Q. Have you been drawing your weekly drawings?

A. Yes, sir.

Q. And is your brother drawing his?

A. Yes, sir.

Q. Is anybody else drawing anything in 1939?

A. We are the officers.

Q. And you completely control the company?

A. Yes, sir.

Q. Have you been paying any license fee in 1939?

A. I think we paid.

Q. You paid in 1938?

A. Yes, sir.

Q. Would you say the payment of two hundred and forty dollars in any way affected your business?

A. It is two hundred and forty dollars.

Q. It hasn't hurt your business any, has it?

A. Well, we may be forced to operate only one night a week this winter.

[fol. 562] Q. That is true practically every winter, is it not?

A. We used to run four nights a week.

Q. Isn't it due to general conditions around Omaha?

A. Possibly.

Q. It isn't due to the two hundred and forty dollars you are paying, is it?

A. There is still two hundred and forty dollars there, and we are doing less business.

Q. Now, suppose there were no ASCAP in Nebraska, and the individual members of the Society, the people who write and compose and publish music of the Society, the music you play every night, wanted to do business in Nebraska and sell you the right to perform for profit, and suppose you wanted to purchase that, as a matter of fact, you would have to purchase music, wouldn't you? You wouldn't close your establishment because ASCAP went out of business in the State of Nebraska, would you?

Mr. Hotz: Object to that as having been gone over, and the question has about four or five independent parts.

The Court: Yes, I think the question is improper; it is compounded.

Mr. Frohlich: I will withdraw it.

Mr. Riddell: Furthermore, if the Court please, it is improper cross-examination.

Q. If there were no ASCAP in Nebraska you wouldn't [fol. 563] want to shut your doors, would you?

Mr. Hotz: I object to that as immaterial.

The Court: It is immaterial, but you may answer.

A. I wouldn't want to, no.

Q. You would want to negotiate for a license with people who compose, copyright and publish music which is now the repertoire of the ASCAP, wouldn't you?

Mr. Hotz: Objected to as having been gone over.

The Court: It is immaterial and fully covered. Objection sustained.

Q. Have you a list of the members of the Amusement Protective Association of Nebraska?

A. No, I haven't.

Mr. Hotz: It is available to the Secretary, but not to him.

Q. What dues are paid by these members to the Association?

A. No dues. It is just a civic association formed by us people that are interested in this fight against the ASCAP.

Q. Does this association have any bank account?

A. No.

Q. Does it have any funds at all?

A. No.

Q. Nobody supplied you with any money at all?

A. We had some money to get out this literature to our [fol. 564] different people.

Q. How much did it cost you to get this literature out?

A. It cost quite a bit. We have sent out three hundred and fifty, probably four hundred, circular letters and cards and so forth.

Q. Did you send out more than this one in evidence?

A. Yes.

Q. A great many more?

A. We sent out two or three.

Q. Did you employ anybody to do any work in the field?

A. You mean traveling?

Q. Yes.

A. No.

Q. What did it cost you to get the circulars out?

A. Oh, I don't know now just what it cost me.

Q. Can't you give me an approximate figure?

A. Each time, forty-five or fifty dollars—each time we sent it out.

Q. Altogether, how much?

A. Two hundred and some odd dollars.

Q. Who supplied that?

A. Us men in the business.

Q. By contributions?

A. Yes.

Q. No dues?

A. No.

[fol. 565] Q. Just contributions?

A. Contributions.

Q. Did you have a man named Paul Halpine out doing work in the field for you in connection with the circular?

A. Mr. Halpine was probably of some help to us during the bill.

Q. Did he get any salary from anybody connected with your organization?

A. No.

Q. Does any other member of your family draw any money from this enterprise you operate?

Mr. Hotz: Objected to as not proper cross examination, and immaterial.

The Court: I think it is immaterial. Objection sustained.

Mr. Frohlich: That is all.

Redirect examination.

By Mr. Hotz:

Q. This Exhibit Number 44 contains at the top a list of the officers and directors of the association concerning which you were talking, does it not?

A. Yes.

Q. Who is H. A. Marble, whose name is signed to it?

A. H. A. Marble is the secretary of the association.

Q. And lives in Omaha?

[fol. 566] A. Yes, sir.

Q. Now, these men in this association were made up from Matt Kobalter of Lincoln, was he one?

A. Yes.

Q. Mr. Joseph Smith from Hastings?

A. Yes.

Q. And Bert Glover of Grand Island?

A. Yes.

Q. And William Barclay of Plattsmouth?

A. Yes, sir.

Q. George Sharpnack of Lincoln?

A. Yes.

Q. Roy F. Gordon of Bennington?

A. Yes.

Q. H. H. King of Norfolk?

A. Yes, sir.

Q. H. A. Marble of Omaha, and yourself?

A. Yes, sir.

Q. They constituted the Board of Directors, did they?

A. Yes, sir.

Q. Those men were all interested in the same line of business, generally, as yourself?

A. Yes, sir.

Q. I think you stated in response to a question by Mr. Frohlich about food and so forth, and drink out there, and

I interrupted. You do not hold a hard liquor dealers license, [fol. 567] do you?

A. No.

Q. You don't sell hard liquor on the premises of Peony Park, and never have?

A. No.

Q. Is there another association also in the State of Nebraska that has dance halls and taverns of that type? These taverns, are they separate from your beer taverns and so forth?

A. Yes, sir.

Q. Do they have an association?

A. Yes, sir.

Q. Of their own?

A. Yes, sir.

Q. You are not a beer tavern and your organization is not the beer tavern association people?

A. No.

Q. Did they cooperate with you in connection with this bill?

A. No.

Q. The men you have just spoken about, whose names I have just called out, they are all residents of the State of Nebraska, to your own personal knowledge, and reside here and operate a business interested in music?

A. Yes, they are.

Q. And were interested in this bill?

A. Yes.

[fol. 568] Q. And are all members of this association?

A. Yes, they are.

Q. And all the members of the association are residents of the State of Nebraska?

A. They are.

Q. And carry on a business here?

A. Yes, sir.

Mr. Hotz: That is all.

Recross-examination.

By Mr. Frohlich:

Q. Don't you sell beer in Peony Park?

A. Yes, sir.

Q. Don't you also supply set-ups for hard liquor?

A. We sell beverages.

Q. You supply that to patrons?

A. We sell beverages.

Q. You furnish White Rock and gingerale for people, and ice to people?

A. Not ice no more.

Q. Do people come into your establishment with liquor, and drink it in your establishment?

A. That is possibly the case in some instances.

Mr. Frohlich: That is all.

[fol. 569] Redirect examination.

By Mr. Hotz:

Q. They don't do that with your permission?

A. No.

The Court: That is so immaterial.

Mr. Hotz: That is all.

Mr. Frohlich: That is all.

Witness excused.

[fol. 570] JOHN J. GILLIN, was called as a witness on behalf of the defendants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Hotz:

Q. State your name.

A. John J. Gillin.

Q. How old are you, Mr. Gillin?

A. Thirty-four, sir.

Q. Where do you reside?

A. I reside at 517 South 38th Avenue, Omaha, Nebraska.

Q. What is your business?

A. I am manager of radio station WOW.

Q. How long have you been identified with the radio business?

A. Since 1926.

Q. In what capacity at the beginning?

A. In 1926 when I finished an A. B. course at Creighton University I started working for the National Radio Advertising, Inc.

Q. Where?

A. In Chicago, as manager of their Chicago office.

Q. What were your duties?

A. My duties were to solicit advertising for national spot radio campaigns, to build program ideas and to sell those ideas to advertisers, as well as also build programs for [fol. 571] the advertiser.

Q. Was that a comparatively new field at that time, that line of industry and business?

A. It was comparatively new from the standpoint of national spot business. There were only two national spot organizations in business—one was Scott Howe Bowen and the National Radio Advertising, Inc.

Q. What is national spot advertising?

A. National spot advertising is when an advertiser usually wants to test the radio out before he uses the network; he takes and places a program in certain spots which we commonly call "markets", like Omaha, St. Louis, Kansas City or Boston. He tests his program out in those markets, either by electrical transcription or live talent. If the program is successful he extends the campaign to other markets by electrical transcription or live talent, or purchases a network.

Q. How long after 1926 did you continue in that line of business?

A. Until 1929, when I returned to Omaha to take a course in law at Creighton University.

Q. Did you graduate from that course in law?

A. I graduated in 1931.

Q. During the time you were in law school did you still continue to be identified with the radio industry?

A. I wrote the continuity for Kozak, Inc., and also at [fol. 572] the same time helped on the Blue Network, and called the Maytag hour from Newton, Iowa; also announced at radio station WOW.

Q. And that continued until 1931?

A. At which time I was made program director, and in 1932 made general manager.

Q. That is what you are now?

A. Yes, sir.

Q. Have you had any musical education?

A. I had four years of piano, my last two years of grade school and the first two years of high school, and six years

of vocal, my four years of high school and the first two years in college.

Q. What is a memory tune, and does that have any significance in the radio business?

A. Well, to me it has a lot of significance, because I believe any musical program of any significance on the air today has at least one memory tune. For instance, a very popular program is the Kraft Cheese program, called the "Kraft Music Hall", featuring Bing Crosby and other stars. His main spot in his program is built around a memory tune, a tune which recalls memories to people who hear it. In other words, a tune popular in 1922 and still is a leading tune on the air today and played quite often, like "Remember" or a tune of that type. That is what is commonly called a memory tune. If you have heard his program you hear him build up the memory tune by saying, "For instance, in 1922, Jack Johnson and Jess Willard fought for the world's championship, and Willard beat him at that time", or Schnozzle Durante is on Broadway with a new show, and the star motion picture at that time is so and so, and then he goes into his tune by saying, "Do you remember", and singing.

Q. That is called a memory tune?

A. No, sir.

Q. Are you a member of any association of broadcasters in the State of Nebraska, and if so, what?

A. I am a Director of the Nebraska Broadcasters Association, and past president of the same, and also past vice-president of the same.

Q. Do you hold any office in the national organization?

A. I was vice-president, first vice-president, of the National Association of Broadcasters, and I have been a member of its Board since 1934, for six years—the sixth year on the Board.

Q. Now, when this Bill No. 478, which is the subject matter of this lawsuit, was introduced, did you, as manager of WOW station, or of any of these organizations in reference to radio, in which you are interested, or an officer, did you have anything to do with the instigating of that bill or starting of it in the first instance?

A. No, sir.

[fol. 574] Q. Or the drafting of it?

A. No, sir.

Q. Or did you ask anyone else to do it in your behalf?

A. No.

Q. When did you first learn about the bill, I mean in reference to what stage had it proceeded in the legislature?

A. It had been introduced in the legislature when I heard about the bill.

Q. Mr. Gillin, what are the principal sources of supply of music in the United States?

Mr. Frohlich: Just a moment. I object to that as this man hasn't qualified himself as an expert.

The Court: Objection sustained.

Q. Let me put it this way: What is the principal source of supply of music for radio stations within the United States?

Mr. Frohlich: I again object to that.

The Court: Overruled.

Q. I didn't mean that from a composer's standpoint, but from the user's standpoint.

A. The principal source of supply is ASCAP, and SESAC, the Society of European Stage Authors and Composers, Inc. SESAC, according to the survey which was made at the instigation of the Board of Directors of 1935 of the National Broadcasters had about fifty-five hundred copyrights. That survey was made by James Baldwin [fol. 575] under our direction and under the direction of the committee which I headed.

Q. That is the Society of European Stage Authors and Composers, Inc., is that right?

A. Yes, sir.

Q. Not controlled by ASCAP?

A. No, sir.

Q. It is independent?

A. Yes, sir.

Q. Was that survey reduced to writing?

A. Yes, sir.

Q. And made available for the public?

A. Yes, sir.

Mr. Frohlich: Wait a minute. To which one are you referring?

Mr. Holtz: This one here, August 18, 1937.

Q. That was made available?

A. It was made available through the National Association of Broadcasters.

Q. Now, that is one source.

A. I would say another source is the music which is in the public domain.

Q. We know something about that, but so that there can't be any mistake about it, public domain means music that either has never been copyrighted or the music copyrighted and the copyrights having expired, is that right or not? [fol. 576] A. That is right.

Q. Under the copyright law, if you will pardon me, it is twenty-eight years and it may be renewed twenty-eight years under the law, so it would mean then that public domain would be such music as was no longer protected by copyright?

A. That is right, sir.

Q. Do you know anything about the extensiveness of that source of supply of music, and generally just what it consists in?

A. That source of supply is very extensive. However, in its present extensive form it is not usable for radio.

Q. Why?

A. Unless it is especially arranged by somebody to bring it up to date. For instance, take a tune like "A Tisket A Tasket" which was brought out and modernized, I would say, and placed on the radio by one of the ASCAP publishers, and because of the different orchestras playing it on the networks it became a very popular number.

Q. Is that a part of the business that the publisher members of ASCAP are engaged in, is that one of the things they do?

A. Oh, certainly.

Q. When they do that, they come under the protection of ASCAP, as you understand it?

A. That is right.

Q. Would you give us, if you could, the names of pieces that are in the public domain that would not come under any present modernizations used generally? I don't mean [fol. 577] extensively, but a few pieces.

A. Well, I believe that there is a lot of music in the public domain that copyrights have not been renewed on. However, if an ASCAP publisher makes an arrangement of that particular tune and places it in the hands of certain or-

chestra leaders and they play it, why, that is known as an ASCAP tune under that arrangement.

Q. Has ASCAP ever furnished to WOW a catalog or list of the copyrighted and vocal and instrumental music which it claims to have?

A. No, it never has.

Q. Did you ever ask for it?

A. We have asked twice for it.

Q. What did they say?

A. I believe the first letter I wrote to ASCAP was in 1932, written to Mr. Greenberg and Mr. Greenberg answered and said their catalog was so voluminous and had a million and a half copies that they couldn't possibly send it.

Mr. Frohlich: The letter is the best evidence.

The Court: Overruled.

Q. And then again did you take it up with them?

A. I have asked for catalogs and I believe the other radio stations have asked for catalogs.

Q. Leave out the other radio stations unless referring to your personal knowledge of the Nebraska stations. Maybe [fol. 578] that has been a matter of discussion in some of your state meetings, has it?

A. It has been, because we have never been able to get ASCAP's catalog, and we don't know what we are buying or paying for.

Q. Explain that to the Court; why is it?

Mr. Frohlich: I object to his explanation of why.

Mr. Hotz: Withdraw the question.

The Court: The question has been withdrawn.

Q. Has the matter of what you were buying from ASCAP, as you put it, been the subject matter of discussion with the state broadcasters in reference to the music that ASCAP is alleged to own and control and claimed to own and control?

A. Yes, it has. There hasn't been a state meeting of the association but what there hasn't been a discussion of that particular group of publishers of ASCAP.

Q. What, if anything, have you tried to do about it?

A. Well, after this particular bill No. 478 was introduced in the legislature I thought the Nebraska broadcasters association should back the bill as far as the state is concerned, in the state.

Q. Now, from your personal observation, Mr. Gillin, and as the manager of WOW station in connection with what is known as popular music, present day popular music, about what percentage of that would you say was controlled by ASCAP?

[fol. 579] Mr. Frohlich: I object to that as he is not a qualified witness.

Q. You keep the logs, don't you?

A. We keep the logs, but not program logs. The only thing I can see, I believe, from everything I have been able to understand in our discussions, is that eighty-five per cent—

Mr. Frohlich: I am making an objection to what he believes and thinks.

The Court: Objection sustained.

Q. Well, what is the basis for your knowledge, Mr. Gillin, of the number of copyrighted compositions of music, and vocal, that ASCAP has, what would be the basis for your knowledge of the percentage of the total of popular music as distinguished from standard music?

A. The basis that I would have would be a survey made with the National Broadcasting Company in which I think during a certain portion of the time it was established that eighty-five per cent of the music was ASCAP music.

Q. How was that survey conducted?

A. From the program logs of the National Broadcasting Company by their own program department under the supervision of John Royal, vice-president in charge of programs.

Q. Were you a member of that committee?

A. I was not a member of the committee that made the survey, no. I was a member of the committee trying to find out how much ASCAP works were being used by the [fol. 580] networks at that time.

Q. Would that percentage apply to your own station WOW?

A. I believe it certainly would, because we are a member of the basic Red Network of the National Broadcasting Company.

Q. Explain to the Court the difference between public and standard music.

Mr. Hotz: Withdraw that question.

Q. WOW is a member of the network that is known as the National Broadcasting Company network?

A. WOW is a member of the basic Red Network of the National Broadcasting Company, and has been a member of same since 1926, at the time the network was formed.

Q. Do you have a contract with them?

A. Yes, sir, we do.

Q. Which specifies your relationship?

A. Yes, sir, we do.

Q. Does that pertain largely to musical compositions that come in over a wire?

Mr. Frohlich: I object to that, if there is such a contract.

Mr. Hotz: We have got it.

The Court: It is just a preliminary question.

A. One of the very important clauses of that contract—

Mr. Frohlich: I object to that.

Mr. Hotz: I don't want that.

[fol. 581] Q. Does it pertain to musical compositions and everything else that comes over the wire?

A. Yes, sir.

Q. And it specifies the different rights and so forth?

A. Yes, sir.

Q. Now, are there any other stations in the State of Nebraska that are so hooked up with the national network?

A. We are the only National Broadcasting outlet in the state at the present moment.

Q. Now, who are identified with the Columbia System, which we all know is another similar network?

A. Radio KOIL, Omaha, and KFAB, Lincoln.

Q. What about the other stations in the state of Nebraska?

A. Those three stations, WOW, KFAB and KOIL, are the only network outlets in the state at the present moment.

Q. There are seven other stations in addition to the three you have mentioned?

A. There are seven other stations in Nebraska, and they are what we commonly call independent stations—that is the term set out in the Association of National Broadcasters, because they have no network affiliations.

Q. Those stations that originate their programs in their studios, in other words, the musicians and signers come

right in there, and so far as the music is concerned, that originates in their studio, is that right?

A. That is right.

[fol. 582] Q. Do you have any music locally that originates in your studio?

A. We do, yes, sir.

Q. How much in dollars and cents do you pay per annum for that music which originates in your studio?

A. Are you asking about musicians now?

Q. Yes.

Mr. Frohlich: That is paid to him?

Mr. Hotz: To the musicians.

A. This year we will pay some twenty-nine thousand dollars to musicians.

Q. For music that originates in your station?

A. Yes, sir, in our studio.

Q. About what percentage of the time, so far as music is concerned over your station of so-called radio time, does such activity take up, that is, the activity of the local musicians?

A. There are usually two quarter-hour programs a day from one orchestra of five pieces, which is called the "Sophisticated Ranger", and never more than two half-hour programs from the studio orchestra, which is a contract orchestra through agreement with the American Federation of Musicians, which don't play over an hour a day. They are required to rehearse two hours a day, and play one hour a day for that amount of money.

Q. Can you give us something as to the percentage of time that consumes, forty per cent, thirty-three and a third [fol. 583] per cent, or forty-five per cent, or what?

A. You can't say each day. For instance, the ranger group is on at 6:45 in the morning, and at the present time 11:45 to 12:00, and an orchestra is on from, say, 11:30 to 12:00 midnight, or 11:00 to 12:30 A. M. For instance, yesterday you had Hitler's speech, and that particular program was out, but it never amounts to more than an hour and a half at the most over our station that the musicians play each day by live talent orchestra music; that is, at the present time.

Q. And KOIL also has local musicians that play right in the studio, play and sing music also?

A. Oh, yes. They have a contract also.

Q. Now, what amount of money did you pay to ASCAP last year, WOW?

A. Last year we paid to ASCAP twenty-two thousand eight hundred dollars.

Q. What is the basis for that amount or charge?

A. The basis for that charge has never been known. We believe it is a very arbitrary charge.

Mr. Frohlich: We object to that. The contract is in evidence.

The Court: The answer may be stricken out as not responsive.

Q. And by the basis of the charge, Mr. Gillin, I mean—
[fol. 584] A. How was it arrived at by ASCAP?

Q. I don't mean that, but I want to know now how the twenty-two thousand eight hundred dollars came to be that amount; why not thirty-two thousand dollars, why not eighteen thousand dollars?

A. That represents fifteen hundred dollars as sustaining fee to the Society, that is, ASCAP, and five per cent of our gross revenue after fifteen per cent agency commissions for national advertising or local advertising agencies have been deducted. That five per cent represents five per cent of all programs, whether they are musical programs or not. That is including news broadcasts where no music is ever played, dramatic programs where no music is ever played.

Mr. Frohlich: I move to strike out the last part of the answer. The contract speaks for itself.

The Court: The motion is denied.

A. (Continuing) The dramatic programs where no music is ever played, and only excepts the five per cent on programs that are of a political nature and of a religious character.

The Court: I think that is all in evidence before.

Q. Is that contract satisfactory to you?

A. No, it is not satisfactory to us.

Mr. Frohlich: I object to that. The contract is in evidence. Whether it is satisfactory or not is immaterial.
[fol. 585] The Court: It may not be very material, but the objection is overruled.

Q. You may answer.

A. The contract is not satisfactory to us, because we believe ASCAP sells their catalog on a very unfair basis.

Q. Why did you sign it?

A. We had no other recourse but to sign it.

Q. Why?

A. Because of the fact that we have a national statute, a copyright act, that says if we infringe on any music there is two hundred and fifty dollar damage fee, and we know we can't get along without ASCAP's music, at least at the present time. We would infringe at some time along the line, and how many times, we wouldn't know, and we have got a contract with the National Broadcasting Company which specifies that we have got to have an ASCAP license or we can't get a program from them.

Mr. Frohlich: I object to that unless he produces the contract in evidence.

Mr. Hotz: Mr. Mills testified to that.

Mr. Frohlich: He didn't testify to any contract between the National Broadcasting Company and WOW.

The Court: It may stand.

Q. Calling your attention to defendants' Exhibit Number [fol. 586] 45, which states that it is a National Broadcasting Company contract with WOW Life Insurance Association, Omaha, Nebraska, radio station WOW, dated December 2, 1936, and which is a photostatic copy, I will ask you if that is an exact copy of the original of that instrument?

A. It is, sir.

Mr. Hotz: You don't raise the objection, Mr. Frohlich, as I understand it, that it is a photostatic copy?

Mr. Frohlich: No, sir.

Q. You are operating under that now?

A. Yes, sir, we are operating under this contract.

Q. In that contract does it pertain to music?

A. Yes, sir.

Mr. Hotz: Offer in evidence defendants' Exhibit Number 45.

Mr. Frohlich: No objection.

Q. Now, Mr. Gillin, when you stated a moment ago that the contract was entered into between yourself and ASCAP, and which is in evidence here, was necessary because you

had to have it, was it necessary also because the music that was controlled by ASCAP was necessary for the operation of your station from a practical standpoint of sellers of radio service or not?

Mr. Frohlich: Objected to as calling for a conclusion.
[fol. 587] The Court: It does, but I think it may go in.

A. Because of two reasons—first of all we know we cannot get along without ASCAP music at the present time, and because our contract with the National Broadcasting Company specifically states we must have an ASCAP contract.

Q. Just explain that, why that is, as you understand it, with the National Broadcasting Company from a practical standpoint, without getting into the technical phases of it.

A. Well, the National Broadcasting Company, the network, does not clear at the source in regard to the ASCAP catalog.

Q. What does "clear at the source" mean?

A. If a program emanates from New York and includes music of the ASCAP catalog, that music is not cleared at the source or emanating point of the program. That is why we have to have a contract in Omaha to protect ourselves from any infringement suits that may be brought by this Society.

Q. In other words, the National Broadcasting Company under their contract with ASCAP, when that music comes out in Nebraska, they have made a settlement or deal with ASCAP, is that right?

A. We have to pay ASCAP five per cent of the receipts on any network that comes over our station.

Q. I think it was testified by Mr. Mills and others that the network pays nothing to ASCAP for their chain service, is that right?

[fol. 588] A. For the network service they pay a sustaining fee for the three network stations that emanate, like our fifteen hundred dollars, but they don't pay any commercial fee on the program emanating and going out over the network stations affiliated with the network.

Q. That fee is collected from the stations throughout the nation, including WOW and the rest of the stations in Nebraska that make use of that network?

A. That is right.

Q. We will have somebody here to testify on KOIL of the Columbia System. Is that the same with them?

A. I can't testify what their contracts are with Columbia.

Q. What do you know about the practical operation of WOW station in Omaha, the mechanical parts? I want to know how the music comes in here and how it is broadcast, just briefly, if you can describe that machinery and that equipment, and where it is located in Nebraska, and as much as you can of it. I am talking about the wire that comes in from New York, and what would come over that wire from New York if you did not have the broadcasting station in Nebraska, WOW; explain that.

A. The National Broadcasting Company leases a specially built wire for radio broadcasts from the A. T. & T. and then sends a program or talks or dramatic programs over that wire to the affiliated stations of the basic network.

Q. Confine it to WOW.

A. The basic network from New York or Hollywood arrives at the local Northwestern Bell Telephone Company and is then sent to our studio at 17th and Farnam.

Q. By what?

A. By a trunk wire leased by the National Broadcasting Company from A. T. & T., where it goes through our amplifying units in the studio and then goes to our transmitter by special wire we lease from the Northwestern Bell, where the program is impressed on our frequency motor.

Q. What did you call that?

A. Frequency.

Q. And impressed on what?

A. Frequency motor.

Q. What is the frequency motor?

A. It controls our frequency, and it is then sent out for consumption to the public. When a program is sent out it is still in radio frequency. And when it reaches your receiving set in your home its frequency is changed into the tones and music which you hear.

Q. If it were not for your station and machinery and equipment in the station in the City of Omaha, Nebraska, and that wire just came into the room, or into any other room, could anybody get any value out of it?

A. They would have to have a receiving set to get any value out of it.

Q. Now, WOW has the receiving set and transmitter in its Omaha establishment?

[fol. 590] A. I mean by that if the line came into a hotel room, for instance, if we were going to have a program from NBC and send it over special leased wire to the court room in Lincoln to have the Court hear that program, if they had a loud speaker here they could hear that program, if they were listening to it off the line, but if they had no loud speaker here, they couldn't hear it. You can attach it to this post, but you have got to have the loud speaker to get the program.

Q. Do you know the number of radios there are in the State of Nebraska installed in homes and elsewhere in the state?

A. No, I couldn't give you that figure.

Q. You don't know that?

A. Not the exact figure, no.

Q. Do you know near enough so as not to be too distant, approximately?

A. I don't want to make a guess.

Q. Where would that information be available?

A. We have the information in our files, but I don't remember the figure.

Q. You could get that for us, couldn't you?

A. Yes, in ten minutes by telephone.

Q. You will do that before you conclude here?

A. Yes.

Q. When this music comes out from New York over this wire that you have just spoken of into your studio for the purpose of being rebroadcast to the public, are you [fol. 591] able to control the numbers that are played?

A. We never know what numbers are going to be included in a program. We very seldom hear of it, unless it is a special program. We don't know who will be the guest artist or what he will sing or what orchestra will play. We have no control over the program that emanates from NBC.

Q. That is where ASCAP enters into that situation, is that right, and why it becomes necessary for you to have a contract with ASCAP?

A. Well, the National Broadcasting Company makes us sign a contract that includes a clause which says we must have an ASCAP license, and that is why we have one. As far as the National Broadcasting Company is concerned. On our local program we would still have to have a license.

Q. That is specified in defendants' Exhibit Number 45?

A. That is not specifically shown in Exhibit 45, but it was in our contract of 1932, and changed in this contract, but it means ASCAP, because the National Broadcasting Company clears at the source, and all other performing right societies—

Mr. Frohlich: Why not read that section?

A. (Continuing): This section says, "You agree to maintain for your station such licenses, including performing right licenses, as now are, or hereafter may be, necessary for your station to broadcast the programs which we furnish to you hereafter."

[fol. 592] Q. There is music, of course, that comes out over this wire from New York that is not ASCAP music?

A. Oh, yes, there is music being broadcast by network that is not ASCAP music.

Q. In connection with that music you are not required to pay any attention to public performance rights and methods of infringement, isn't that right?

A. We never have.

Q. Why is that, again?

A. Well, because of the fact that ASCAP's license is supposed to protect us.

Q. I mean these other programs of music that is not ASCAP music, why do you not have to pay any attention to those?

A. Because they are cleared at the source, NBC headquarters, New York, Chicago or Hollywood.

Q. That is not true with ASCAP?

A. That is not true with ASCAP.

Q. By clearing at the source you mean they have made arrangements with the users of the music?

Mr. Frohlich: I object to that as calling for a conclusion, and not a single fact in evidence to show that.

The Court: You might say, "What do you mean by clearing at the source?"

Q. Answer that; what do you mean by "clearing at the [fol. 593] source"?

A. By clearing at the source I mean that any liability would be taken care of at the source, and payment of any sum of money for the right to broadcast that particular music would be paid at the source at which it emanates.

Q. You are talking about infringement of copyrights?

A. Specifically.

Q. And you are talking about copyright fees?

A. Yes.

Q. And public performance rights and everything else?

A. That is right.

Q. I want to get at the negotiations leading up to this contract that is in evidence here now with ASCAP, between ASCAP and WOW. How were the terms and conditions of that contract arrived at as between your organization and ASCAP?

A. ASCAP sent us the contract and asked us to sign the contract through their Omaha office, which is Mr. Blazer. We held it up because we received a wire in 1932 from Mr. Loucks; he negotiated with Mr. Mills or Mr. Paine for extension of the contract, I believe, to September 1st, until the time that the negotiations would be settled, and we received a wire in the early part of January from ASCAP and it said specifically if we didn't sign the contract before January 15th, that was the deadline, we would then give ASCAP a cause of action for infringement suits against the station.

Q. Was the contract in satisfactory form for WOW at that time or not, when you signed it?

[fol. 594] A. Not to us.

Q. Why not?

A. There were no discussions about the contract so far as the station was concerned at all. It was just sent to us and they said, "Here is your contract; sign it or else."

Q. What were the objectionable features?

A. The objectionable features are that you are paying five per cent on everything that goes out over our facilities of a commercial nature, whether news, dramatic programs or what it is, and we have always tried since 1932 as an industry to ask ASCAP to give us a contract on a per program basis. In other words, for the amount of music that ASCAP controls, and that we use, if we use ASCAP music on that program. In other words, if the program includes ASCAP music, we will pay for it the same contract as the newspapers have today. If it doesn't include ASCAP music, we don't want to pay for it, because we are either paying for public domain music or somebody else's music then and ASCAP is still getting the money for it.

Q. That is the condition that exists today as far as your WOW station is concerned, and no doubt other stations in the State of Nebraska?

A. That is right.

Q. So that if I understand it, in conclusion of your testimony, WOW's contract with ASCAP today is not the result of trading and negotiating which resulted in a satisfactory contract to your organization?

Mr. Frohlich: I object to that.

A. No.

The Court: Objection sustained, and the answer stricken.

Q. Some mention was made of a Lang-Worth catalog here in the direct examination on the other side. What is the Lang-Worth catalog?

A. The Lang-Worth catalog is the old N. A. B. bureau of copyrights of some twenty hours of music and eighty hours of music out of the original one hundred hours of music. Mr. Langloise and Mr. Wentworth who own the catalog now, were able to get together from the public domain and other particular sources of music that does not carry any copyright fees. Once you purchase the Lang-Worth catalog it is free from any copyright fees, but it is only one hundred hours of music, and a radio station cannot just use one hundred hours; it is not sufficient to carry the bulk of its program.

Q. Mr. Mills made the statement, and I think Mr. Buck did the same, that WOW or one of these stations here in the State of Nebraska, if it wanted to, it could run and operate without ASCAP music. Is that true from your viewpoint or not?

Mr. Frohlich: I object to that as characterizing another witness' testimony.

[fol. 596] Mr. Hotz: Well, he said that.

The Court: Overruled.

A. WOW could not run without an ASCAP contract. We are willing to pay ASCAP for the music we use.

Q. I think you testified you never had furnished to you a catalog showing the ASCAP music, and that you had asked for it?

A. Yes, sir.

Q. And they never furnished it?

A. No, sir.

Q. I will call your attention to this book, I have had the court reporter mark Exhibit Number 46, and will ask you to state if that is the catalog of the SESAC Society of European composers you spoke about having some fifty-five hundred pieces of music in it?

A. Fifty-five hundred. That is the N. A. B. report, sir—a special edition sent out.

Q. About how many pieces of music are there in the Lang-Worth catalog?

A. I wouldn't be able to specifically state how many numbers are in there, but there are one hundred hours of music available to broadcasters at the present time, of which no copyright fees are attached.

Mr. Hotz: Offer in evidence defendants' Exhibit Number 46.

Mr. Frohlich: No objection.

[fol. 597] Q. That is not a catalog but is a survey by the National Association of Broadcasters, this Exhibit Number 46, but it does contain the names and the pieces of music in SESAC?

A. It contains the names and pieces of music as of that date.

Q. Of date August 18, 1937?

A. Yes, sir.

Q. Where does most of the music that is in Exhibit Number 46 originate—where did it originate?

A. Most of the music in that catalog originates in Europe of certain publishing houses that have not received a license from ASCAP, and have made no overtures to ASCAP to receive a license from ASCAP.

Q. It is mostly foreign music?

A. Foreign music.

Q. Most of it is foreign music?

A. Most of it.

Q. Is it of any great commercial value?

A. No, it is not of any great commercial value. The SESAC library's only commercial value at the present time comes from the hill-billy tunes in it, like M. M. Cole and so forth which SESAC picked up.

Q. Do you know who the associated music publishers are? That was referred to by Mr. Mills as having music for your station?

A. Yes.

[fol. 598] Q. Who are they and what did they put out?

A. The Associated Music Publishers, if I am right, now has—I am trying to think of two organizations; one of them gives you the right to play certain music and transcribe certain music, and the other one has a library, and I can't differentiate between the two, which is the exact name of the two.

Q. The Associated Music Publishers is the library?

A. The Associated Music Publishers have a library of music that they sell to radio stations, like Lang-Worth and so forth.

Q. Is that a recorded library for records?

A. It is a transcription library of very fine music.

Q. Does it license the performance rights, or don't you know that?

A. We do not have the Associated Music Publishers library service, but I don't think there is any difference to the Source or the World whereby if you have a commercial program you have to pay five per cent of that particular program, that is, sale of time.

Q. Does it amount to any considerable amount of music?

A. It is a nice library, but not the library the Source or World is. It is fine music, but not as extensive as the Source or World. In other words, the Source has about three thousand numbers in it today, and I don't think the Associated has half that many.

[fol. 599] Q. Would those combined with others that you speak of, be sufficient to run and operate your station?

A. I say we can't get along without ASCAP, unless public domain music is arranged by broadcasters in suitable form for playing over the air, to be able to say, "Here, we have got enough music", and that is very, very hard to say because you never know when you are going to infringe upon an ASCAP publisher. I know at the present time if we took a fifteen minute program each day and put in it nothing but SESAC hill-billy tunes, and another fifteen minutes with Lang-Worth, all right, that is a half an hour of these that we could run on the average from day to day of copyrighted free music.

Q. Add to that this Associated Music Publishers and the World.

A. Those are transcription services on which we still have to pay five per cent on the receipts. If we have a program with Lang-Worth, which is copyrighted free music, in the morning at 6:45 A. M., and your client decides to take Lang-Worth because it is cheaper than the Source, still you have to pay five per cent of the receipts to ASCAP, and it is not ASCAP's music.

Q. Mr. Gillin, another question: When this bill was pending in the legislature, after it was introduced, did the National Broadcasters or the association as such have anything to do with it at all?

A. No, the National Broadcasters had nothing to do with it.

[fol. 600] Mr. Hotz: That is all.

Cross-examination.

By Mr. Frohlich:

Q. What is the call letter of your station?

A. WOW.

Q. What is the corporate operating station?

A. Woodmen of the World Life Insurance Association.

Q. How long have you operated that station?

A. Since 1923, April 8th.

Q. How long have you been connected with them?

A. Since 1930.

Q. During all this period since 1930 were you also personally a member or connected in any shape, manner or form with the National Association of Broadcasters?

A. I went to the first meeting in 1932 and was elected to the Board in 1934.

Q. So that in 1932 you attended the first meeting of the National Association of Broadcasters?

A. Right.

Q. You knew the National Association of Broadcasters was in negotiation at that time with ASCAP, didn't you know that of your own knowledge?

A. I say there were discussions in the matter.

Q. There were discussions at that time, were there?

A. Yes, sir.

[fol. 601] Q. These discussions were going on between the

National Association on behalf of all the broadcasters who were members of that body, isn't that right?

A. Until a certain point in which you didn't recognize them any more, and sent out your contracts.

Q. Will you please answer my question? Weren't these discussions going on by the National Association of Broadcasters on behalf of its members? Yes or no.

A. Yes, they were.

Q. And wasn't WOW and the Woodmen of the World Life Insurance Association at that time in 1932 a member of the National Association of Broadcasters?

A. Yes, sir.

Q. Did you, yourself, participate in any of these negotiations or discussions with the Society in 1932?

A. No, sir.

Q. Did a time come later when you did participate in discussions on behalf of the National Association of Broadcasters with the American Society?

A. No, but there was a time when I sat on the Board on which all negotiations or discussions were taken up with the Board and a special committee, of which I was a member—the executive committee.

Q. You knew way back in 1934 and 1932 and all those years that there had been a discussion between the National Association of Broadcasters and the American Society with respect to a per piece system, a broadcast system [fol. 602] and a blanket license system, you knew that, didn't you?

A. I already testified to that; yes, sir.

Q. There was a lot of discussion going back and forth all those years, and the broadcasters brought out the suggestion of the per piece system, that they would like the per piece system?

A. We made a demand for the per piece system and the per program system, and were never able to get it.

Q. You got the blanket license system?

A. Yes, sir, but it covers everything on our program schedule; we pay for everything.

Q. Let us take the program system. Wasn't there a discussion between your association and the American Society which went into the practical operation of such a system; were you present at any of those discussions?

A. On the per piece system?

Q. On the program system.

A. I have been at all those negotiations as far as the Board is concerned. The committee reported back to the Board, and the Board took it up and discussed it at great length, yes.

Q. If the program system were operated, how do the broadcasters want it to be operated, in what manner?

A. We want to pay the same as any other newspaper station today, on the music used on the air. That is, if we [fol. 603] have dramatic program, for instance, and there is no ASCAP music on that program, we don't want to pay you for the music we use. If it is a news program, and you have no copyright on news, we don't want to pay you for that program.

Q. Didn't your association sit in on discussions with respect to newspaper contract that was formulated in 1932?

A. I don't think they sat in directly. I think certain members of the National Association of Broadcasters went out and made their own deal, like the networks did in 1932 with you gentlemen.

Q. As a matter of fact, didn't the National Association of Broadcasters approve of a newspaper form of contract?

A. Later they did, yes, because of the fact they wanted to hold all portions of the industry together.

Q. In 1932 the situation was more or less experimental in your industry, wasn't it?

A. We had had a contract, I think WOW, for a number of years with ASCAP, and every other station did too.

Q. It was a young industry and had not been in business long prior to 1932, WOW?

A. I had had discussions with ASCAP over the payment in 1926 of fees on the Maytag program.

Q. The plan with respect to the newspapers hadn't been worked out prior to 1932?

A. No, sir, not to my knowledge.

Q. That was worked out in 1932 with the knowledge and approval of the National Association?

[fol. 604] A. The contract was made first and later approved to hold everybody in the industry so that there would be no breaking up of the industry, of the National Association of Broadcasters.

Q. So that at that time in the year 1932, or shortly there-

after, the National Association approved of this newspaper contract and felt that it was fair and just?

A. They had to do it or the newspapers would have formed their own organization.

Q. They really approved of the contract, didn't they?

A. Yes; they had to.

Q. It was approved by the association?

A. Under everybody's protest.

Q. Now, the National Association sat in with the Society with respect to the commercial contract between the Society and the various broadcasters throughout the country, isn't that right?

A. There has been a committee appointed every time a contract has come up, but were never able to get a satisfactory agreement.

Q. Wasn't there a committee representing the National Association of Broadcasters in a discussion and negotiation with ASCAP in 1932?

A. Yes, there was until Mr. Levy and the networks went out and made a deal with you gentlemen, and we had to take it or else.

[fol. 605] Q. Didn't that committee represent the entire association and each member of the National Association?

A. That is right, and Mr. Levy—there should be a full explanation.

Q. I didn't ask you for a full explanation. I simply want the facts. After the National Association had approved of the commercial contract, your station was notified that there had been an agreement between the American Society and the various broadcasting stations, isn't that right?

A. No. The networks made their contract, and the gentlemen that were running the National Association then from the executive standpoint in Washington wired us, and they wired every other station. The networks made a deal with ASCAP and they were leaving it up to us, and the demand came from your office to either sign on January 15th or there would be infringement suits.

Q. Were you ever notified by any person on behalf of the National Association away back in 1932 that an agreement had been made between ASCAP and the association?

A. No. The only agreement that was made was the letter that was sent out by Mr. Loucks stating he had an

agreement with Mr. Mills extending the contract under its present basis from September 1st until negotiations or discussions were arrived at a satisfactory point. That is the only thing we received.

[fol. 606] Q. Subsequently your station signed an agreement with ASCAP?

A. We signed it before January 15th.

Q. January 15, 1933?

A. January 1, 1933—between January 1st and January 15th, sometime in between that time.

Q. So far as you know, the other members of the National Association signed a similar agreement?

A. They had no recourse but to sign.

Q. They signed it, didn't they?

A. Sure.

Q. The agreement was perfectly satisfactory at that time to the National Association, wasn't it?

A. No.

Q. Did the National Association advise you not to sign any such agreement?

A. They said if you do not sign it, you are doing it at your own risk.

Q. Now, Mr. Gillin, I understand you to testify that last year you paid to the American Society approximately twenty-two thousand dollars?

A. Twenty-two thousand eight hundred dollars.

Q. Of which fifteen hundred dollars was a sustaining fee?

A. Right.

Q. And the balance of about twenty-one thousand dollars was five per cent of the time on the air you sold?

A. That is right.

[fol. 607] Q. What did your station take in in gross receipts in 1938? These figures you have given us represent 1938?

A. Yes, 1938—twenty-two thousand eight hundred dollars. I have it here. Do you mind if I read it to you? \$472,451.21.

Q. That is the amount your station took in in cash from advertisers for the sale of time on the air during the entire year 1938, isn't that right?

A. That is the gross amount of money taken in for time, for talent and for everything that we did.

Q. For the sale of time on the air, is that right?

A. This is our gross receipts and it includes talent fees. If we sell a singer to somebody, it includes that service. We may send out a troupe of actors out to Nebraska, and it includes that.

Q. I didn't ask you for those figures.

A. It includes a lot of things.

Q. Are you able now to give this Court the amount of money that your station took in in 1938 for the sale of time on the air?

A. No, I can't give the exact amount, but I can give them the gross receipts for time and every other function of the station; that is all I can do. I think you will find that this particular amount here, if you will deduct your fifteen hundred dollars sustaining fee which we pay you, and then take—

[fol. 608] Q. (Interrupting) Let us do that.

A. Well, the whole thing, after you get your fifteen per cent off, and deduct talent and commercial programs of political and religious character and get down to that, and all expenses, it would not be within the scope of the five per cent tax levied on the station. You have got your five per cent, and that five per cent is right.

Q. What did you pay to the advertising agency during 1938?

A. I can't give you that figure—it is fifteen per cent.

Q. Of what?

A. Of the gross sale of time on the air—only time; no talent.

Q. Don't you know that figure?

A. You mean the figure in time?

Q. The time on the air.

A. I know the gross figure. I will tell you why I don't know that, because I am manager of the station and our particular station is merely a department of the Woodmen of the World Life Insurance Association. Whatever the sale of time of the station is, I never look at it because it goes to the auditing department of the Woodmen of the World Life Insurance Association. At the end of the month I get what the station made net, and I also get at the end of the year what the station grossed. That is all I get and that is all I am supposed to know. Mr. Bradshaw, president, or Mr. Patterson, or Mr. Shepherd can tell you exactly what out time sales were, but I can't.

[fol. 609] Q. You as general manager negotiate for the deals where the advertisers do business with you?

A. Right, but I don't know how much money the corporation made or the time sales grossed.

Q. What did you receive from the National Broadcasting Company for the hook-up?

A. That is all included in this figure.

Q. In what figure?

A. In the four hundred thousand dollar figure.

Q. Just give us that figure again, please.

A. \$472,451.21.

Mr. Hotz: And the amount you paid ASCAP was \$21,800?

The Witness: Twenty-two thousand, eight hundred paid to ASCAP in 1938.

Mr. Hotz: Multiply that by twenty.

The Court: Multiply by twenty and you will have the total.

Q. Now, you testified you don't keep logs of the particular musical compositions you play, is that right?

A. We are keeping logs of the program in which we are playing only copyrighted music to find out how much we can play if we had to, but not keeping logs on the amount of ASCAP music because we don't know what their catalog is.

Q. Do you play any transcription records at all?

[fol. 610] -A. Yes.

Q. You know that the Federal Trade Commission recently propounded a rule that all of you stations should file with it a complete log of each and every musical composition played in that manner?

A. They just retracted that rule last week.

Q. You know the chief objector to that rule was the National Association?

A. Why, naturally, it would take four more auditors to work in the station, in every station in the United States.

Q. These four auditors would be required to keep track of the records played by transcription?

A. Required to take part—every program and selection and so forth was wanted on the log.

Q. In other words, you would have to increase your clerical staff in order to keep track of this rule of the Federal Trade Commission with respect to the transcription records only, is that right?

A. Sure, you would have to increase it.

Q. By how many employees would you have to increase your staff?

A. I don't know. We have seventy-two now, and I don't know how many it would be increased to.

Q. How many hours of transcription do you have a day?

A. Well, we have forty-five minutes—about an hour and five minutes a day of transcriptions.

Q. A little over an hour?

[fol. 611] A. Yes.

Q. About how many hours do you broadcast?

A. Nineteen and a quarter hours a day.

Q. About eighteen hours of general broadcasting, and one hour of transcription records?

A. That is right.

Q. Suppose you had to keep a record of each and every musical composition that came into your studio, transferred or broadcast by your studio, for the eighteen hours a day, would there be a necessity for additional employees?

A. Certainly, but we would be willing to do that.

Q. Please don't volunteer.

A. I think I ought to explain why we would be willing to do it.

Q. Please, I don't want it.

A. Neither do I, but I will give you the full picture of it.

Q. We will get the full picture of it. If you were running a program system you would have to report either to ASCAP or to any individual owner of copyrights or any other society what programs contained their music, wouldn't you?

A. That is right.

Q. In order to do that, you would have to keep a fairly accurate log of each and every program emanating from your studio?

A. Right. We would pay only for what music we could use.

[fol. 612] Q. You would have a record of each and every composition on the program?

A. Certain stations do that in the United States, because they save money.

Q. Wouldn't it entail a tremendous expense to you?

A. Not when we pay you for something else.

Q. Wouldn't keeping track of the musical compositions

and programs in detail for the purpose of reporting properly, entail very substantial increase in your operations?

A. Yes, but it would be less in the long run, because we wouldn't have to pay on all programs of a commercial nature.

Q. Wasn't it pointed out in the negotiations in 1932 by Mr. Mills and Mr. Paine to the broadcasters that the operation of the program system would be tremendously expensive to the broadcasters? Wasn't that shown to them?

A. Not to my knowledge.

Q. Not to your knowledge?

A. No. We have asked for it since 1932, and we are still asking for it in the present discussions.

Q. If you were operating on the program system you would have to report to the owners of the copyrights with respect to each and every composition played on each and every program, wouldn't you?

A. I believe that could be worked out differently.

Q. Wouldn't you have to report it?

A. We could buy a catalog, whether it was Schirmer or [fol. 613] Berlin and so forth, and we would buy it for a certain price. If the price was too great we would go over to Jesse Lasky, or Metro-Goldwyn-Mayer and say, "We would like to buy your catalog."

Q. I didn't ask you what you would buy. I want to know as a business proposition in the practical operation of your studio whether, if you were operating on a program system under which you were paying the owners of the copyrights of musical compositions, you wouldn't have to keep accurate records of each and every program and report that to the respective owners?

A. That is right. About eight hours a day of our particular program schedule now, Mr. Frohlich, is N. B. C. commercial programs of a dramatic nature, four hours a day of music from N. B. C. cleared at the source. There would be only about three hours a day you would have to keep tab on. What do I have a program director and two assistants and a production manager for?

Q. If the music from N. B. C. is not cleared at the source, and came into the studio, wouldn't you likewise have to report that music to the copyright owners?

A. Certainly, we would.

Q. Wouldn't that entail substantial expense to your organization?

A. Yes, but I believe it would be a saving of expense under what we are paying now.

[fol. 614] Q. You mean you wouldn't have to hire additional people?

A. I say some.

Q. You would have to pay salaries?

A. But not as heavily.

Q. You would have to pay these people salaries?

A. Yes, certainly. We have a contract department and a program department that is pretty competent.

Q. When you furnished these statements to the owners of the copyrights after you had made your program inspection and had broken down each and every program, wouldn't you expect that they would have the right to check up the accuracy of your reports?

A. Certainly, sure.

Q. If on a program system, you would expect that the owners of these copyrights would want to check up to see if you were giving accurate reports?

A. We would want them to.

Q. It would entail expense on their part?

A. Yes, sir.

Q. Wouldn't it be the natural and practical thing in your business, inasmuch as you have got to take the music from them, that they would pass that expense onto you? Isn't that the picture of the proposition, they would pass that onto you?

A. Certainly.

Q. Taking that into consideration with other expense you [fol. 615] would have, wouldn't that increase the cost of your operations considerably?

A. But it would decrease the amount of money we are paying because we wouldn't pay them for news broadcasts, which means a substantial amount of money, or dramatic programs eight hours a day.

Q. You are making the assumption that you would continue to pay five per cent on such programs, aren't you?

A. No; I never said that. In all our discussions, nothing has been reached as yet, because you gentlemen will not discuss it with the National Association. You haven't said any figure, except you must pay more.

Q. Did we ever tell you you would have to pay more?

A. Yes.

Q. When?

A. I was told——

Q. Who, on behalf of the American Society, told you you would have to pay more?

A. The ASCAP—I beg your pardon, the ASCAP did not, but Ed Klauber did.

Q. Is he an official of the Columbia System?

A. Right.

Q. Did anybody on behalf of ASCAP tell you in words and substance you would have to pay more?

A. No, but Mr. Klauber has been discussing the thing with you and reported back to the Directors of the N. A. B.

[fol. 616] Mr. Frohlich: I move to strike that out.

The Court: It seems to be about as pertinent as the rest of it. It may stand.

Q. Now, as I understood it, you were unable to tell whether or not you were infringing on the music owned by ASCAP members or not?

A. No, because we have never received their catalog.

Q. Your orchestra brings into the studio musical compositions from which they perform, don't they?

A. That is right.

Q. And at the foot of each musical composition, on the first page, you have noticed the copyright notice, haven't you?

A. Yes.

Q. And you have seen the name of the publisher or the owner of the copyright?

A. We play a little non-copyrighted music, too.

Q. You know the name of the publisher and the copyright proprietor?

A. I know, but why should we go into that because we have got a contract now with ASCAP.

Q. I am not asking that. I say, you know that is shown on each musical composition?

A. Yes sir.

Q. All you have to do is look at the foot of the page at the notice and see whether the name on that notice is included in the membership list of ASCAP?

[fol. 617] A. On a lot of transcriptions we play we don't know whether we are infringing or not.

Q. In those transcriptions do you play some copyrighted musical compositions?

A. We don't know. They come from N. B. C.

Q. Don't they come into your studio?

A. Yes.

Q. If you were trying to avoid infringement, couldn't you examine the music?

A. Certainly.

Q. You would find that there, wouldn't you?

A. What?

Q. You would find the name of the owner of the copyright.

A. On the transcription? Not on the transcription.

Q. There is nothing on the transcription?

A. Nothing on the transcription says it is copyrighted by the owner, author and composer.

Q. Well, couldn't you obtain from the person supplying the transcription the name of the owners of the copyright, couldn't you get that from them?

A. I imagine we could.

Q. In other words, the transcriptions are not published, are they?

A. No. We buy them from N. B. C. for a hundred and seventy-five dollars a week.

Q. You don't know how they get them?

[fol. 618] A. We know they transcribe them themselves and sell them to us.

Q. N. B. C. has been trying for a long time to build up a library of copies not owned by members of the Society?

A. Most of the music they have transcribed is ASCAP music, that we have in our library.

Q. Do you mean to tell me that N. B. C. takes ASCAP music and makes a copy of it?

A. No copies of it, but they are in the form of transcriptions, and they charge us a hundred and seventy-five dollars a week for the use of those transcriptions.

Q. Are they printed?

A. Phonograph records.

Q. You were speaking of transcription records now?

A. That is right.

Q. When you pay that hundred and seventy-five dollars, it doesn't indicate how much or how little of those records you use?

A. No.

Q. You can dip into all the records and use as much or as little as you please?

A. That is right, but we only play what we think we should play.

Q. In other words, you are paying N. B. C. for the records a blanket license, aren't you?

A. That is right. We are not paying a blanket license on [fol. 619] those records, no. We don't own those records. We pay a hundred and seventy-five dollars a week for the use of those records, but they own them. It doesn't include any copyright fee. We still have to pay you five per cent on top of that.

Q. Do any network programs originate in your station?

A. Not at the present time. We used to emanate three per week on the basic Red Network.

Q. Under your contract at the present time with the National Broadcasting Company, these network programs originate outside of the State of Nebraska, don't they?

A. Right.

Q. And they come into the state as you have described, by telephone wires?

A. Yes.

(Whereupon an adjournment was taken until 1:30 o'clock P. M.)

[fol. 620] (Pursuant to adjournment, Mr. John J. Gillin resumed the stand and testified further as follows:)

By Mr. Frohlich:

Q. Now, Mr. Gillin, did I understand your testimony this morning to state that your station had a license with SESAC at this time?

A. Yes, sir.

Q. Now, what year did it first obtain a license from SESAC?

A. I don't remember the exact year. It certainly isn't as long as ASCAP.

Q. Could you give us the approximate period or date of year?

A. It was about the time when they took over the copyrights of the Cole Publishing Company, and the reason they bought it was because they needed some hill-billy numbers.

Q. When would you say that happened?

A. Well, I don't know when they took it over.

Q. Prior to your taking a license from SESAC had you played in your station or performed any of the numbers that are covered by SESAC catalog?

A. Not to my knowledge, but we may have through the National Broadcasting network service, but not locally, I don't believe.

Q. Of course, if you played any of those through the National network service, you were infringing on the SESAC music?

A. No, because the N. B. C. clears at the source.

Q. Under their arrangement with SESAC they alone are [fol. 621] liable for any infringements over any stations on which they hook up that particular program?

A. That is right. In other words, they cleared at the source.

Q. In other words, you were perfectly free then?

A. Yes, sir.

Q. I show you this defendants' Exhibit Number 46, and direct your attention to the number 758 under the word SESAC on the front page. Can you tell us what that signifies?

A. No, I can't.

Q. Did you know that SESAC made a claim against the National Association of Broadcasters, and that it was going to bring suit for publishing this volume or book, defendant's Exhibit Number 46?

A. I think they made a claim, but they never sued N. A. B. on it.

Q. Did you know the claim was based on the fact that this book did not contain all the compositions which SESAC claims it owns or controls?

A. They may have claimed it, but they didn't bring suit, Mr. Frohlich.

Q. How did you get in possession of this document?

A. It isn't my document.

Q. Who furnished that to you?

A. The defendants' attorneys.

Q. You mean Mr. Hotz?

[fol. 622] A. Mr. Hotz had the document. I believe we have got the same document at the station, but I didn't bring it down.

Q. Are you sure that you have that document?

A. I think we have.

Q. Was this circulated publicly, do you know?

A. I think it was circulated to those stations that desired it, just like any other publication.

Q. Was it circulated to members of the National Association of Broadcasters?

A. Mr. Frohlich, any publication of the N. A. B. report comes out once a week, that is the official organ and publication of the National Association of Broadcasters, the N. A. B. Reports. Now, the N. A. B. Reports go out to every member of the National Association of Broadcasters.

Q. You know this defendants' Exhibit Number 46 contains a facsimile of the contracts which are entered into between the broadcasting stations, including all of the network stations and SESAC, you know that, don't you?

A. A facsimile of all the contracts?

Q. A facsimile of their form of contract.

A. I have never looked over that. I didn't know that.

Q. Will you look at this document that is part of Exhibit number 46 designated Exhibit 1?

A. Yes, sir.

Q. Is that document a facsimile of your contract with SESAC?

A. I would have to read it over very thoroughly and get [fol. 623] our contract at the station with SESAC and compare it very thoroughly before I would say it does.

Q. Is your contract available?

A. It is at the station and I can get it for you.

Q. I wish you would. Did you ever read this sentence on the first page of this report of defendants' Exhibit Number 46: "Because of the equivocal terms and phrases contained in the SESAC's license agreements (copies of which are marked Exhibits 1 and 2 are attached to and made a part of this report), we were unable to determine from that instrument specifically what the SESAC had to offer"; did you ever read that?

A. I don't remember reading it, no.

Q. Do you know that in this document, Exhibit 1, being the form of contract which is mentioned in the sentence I just read to you, there is this clause——

A. I have never read that contract.

Q. No. 7 in the contract——

The Court: If he hasn't read it, he wouldn't know what the clause is.

Mr. Frohlich: Well, we can get that from his contract.

Q. Your station has fixed rates which it charges to advertisers for its service and facilities?

A. Yes, sir.

Q. Now, those rates vary from time to time, don't they? [fol. 624] A. Yes, sir, it varies at the particular hour of the day. In other words, from 6:30 to 8:30 A. M., and 8:30 A. M. to 6:00 P. M. there is a certain rate, and from 6:00 P. M. to 11:00 P. M. there is a certain rate, and then the early morning rate goes back into effect.

Q. Have you ever seen this magazine, "Radio Advertising"?

A. Yes.

Q. Is that an accurate and truthful survey of the rates of the various broadcasters?

A. I believe it shows what the broadcasters charge for their time at the present time. If that is the September issue, it would be accurate so far as I know.

Q. And in the September, 1939 issue, which I am going to show you, did you supply the information to the magazine with reference to your rates?

A. Certainly.

Q. Now, I call your attention to page 143 of this magazine, and ask you whether that accurately represents the various rates of your station WOW?

A. Yes, sir, it does.

Mr. Frohlich: I would like to offer in evidence plaintiffs' Exhibit Number 47, this one page.

Mr. Hotz: Objected to as not proper cross examination.

The Court: Overruled.

[fol. 625] Q. Are you familiar with the other rates charged by the broadcasters in Nebraska?

A. No. I have got our story to tell, and that is enough.

Q. You have no idea of the accuracy of the rates of the other stations?

A. No.

Q. Now, on this Exhibit Number 47 there is this statement: "Week days, 6:00 P. M. to 11:00 P. M., one hour, \$320.00." That is correct, isn't it?

A. That is correct,

Q. That is the rate to the advertisers for use of one hour of station facilities for that period of the week day?

A. Yes, sir.

Q. From 8:30 to 6:00 P. M. you charge for one hour \$160.00?

A. Right, sir.

Q. And from 6:30 A. M. to 8:30 A. M. you charge for one hour \$100.00?

A. Yes, sir.

Q. On Sundays you charge for one hour \$320.00?

A. Yes, sir.

Q. And from 7:00 A. M. to 6:00 P. M. on Sunday, \$200.00?

A. Yes, sir. That is for an hour's broadcast—a continued hour broadcast.

Q. Are you familiar with the rates that were charged by your station in 1929?

A. I just don't remember. I think it was \$70.00 a quarter [fol. 626] hour—most of our programs are sold on the quarter hour basis. We have a few half hours at \$165.00, but most of them are sold on quarter hours for spot and local programs.

Q. Isn't it a fact that in 1929 your rate for week days from 6:00 P. M. to 11:00 P. M. was \$190.00?

Mr. Hotz: Objected to as not proper cross examination and immaterial.

Mr. Frohlich: I want to show the increase in these rates over the years.

The Court: He may answer.

A. May I explain why we raised the rates, your Honors?

The Court: Yes.

A. The rate in 1929 is that what you stated?

Q. 1929.

A. Was how much, sir?

Q. \$190.00.

A. At that time our national network rate was \$190.00. Now N. B. C. charges the advertisers \$320.00 and ask us to conform to it, and that is why we charge \$320.00 an hour.

Q. Will you show me anything in this table of rates, Exhibit Number 47, which differentiates between the rates charged by the network hour and the rates for advertisers on your station?

A. Yes.

Q. Where?

A. There isn't in here, but there is in the book. I will [fol. 627] show you in the book the basic Red Network on page number 16 of this Exhibit Number 47. On page 16 the basic rate for a quarter hour on the network at night, WOW, is \$128.00 per hour. Our basic rate for spot is \$95.00 per quarter hour.

Q. I am not asking you about spot.

A. Well, now, I am saying this spot programs, not network. That is not our network rate.

Q. On page 143 of this document which has been put in evidence as plaintiffs' Exhibit Number 47, the following appears: "The following rates apply to national advertising. For local advertising rates consult station management."

A. That is for national—can I interrupt here?

Q. Yes.

A. Those rates are for a national advertiser who wants to use the entire coverage arrangement that WOC can give to him on a program they will send us, or electrical transcription. The national network rates apply back on page 16 when a program emanates from New York over the basic network of N. B. C. There is one spot program and one network program.

Q. Take the advertiser in Omaha who wants to use your station for one hour on a week day at any time between 6:00 P. M. and 11:00 P. M., what rate do you quote him for that one hour?

A. We charge him the same rate for an-hour as the [fol. 628] network rate, but the other rates are lower.

Q. You charge him \$320.00, is that right?

A. Yes. And our other rates are lower.

Q. In 1929 for that same hour you would have charged him \$190.00, is that right?

A. The same as the National network for the quarter hour.

Q. In 1929 the National Broadcasting Company, when they sent a hook-up hour into your station in Omaha, paid you at the rate of \$190.00, is that right?

A. Yes, sir.

Q. And tonight, if they send a program in through your station on a hook-up, they pay you \$320.00, is that right?

A. In 1929 they paid us for any broadcast emanating from New York on the basis of \$50.00 an hour revenue to

us. Today that revenue is a little bit more than that—it is about twenty-six per cent of the \$320.00.

Q. I would like to get the figures in 1929 when the broadcaster sent a hook-up program into your station in Omaha. He paid you how much?

A. \$50.00 an hour.

Q. For one hour for a week day between 6:00 P. M. and 11:00 P. M.?

A. Yes, sir.

Q. Today the National Broadcasting Company pays you how much for that one hour in dollars and cents?

A. Twenty-six per cent of \$320.00, whatever it is.

[fol. 629] Q. Roughly, about \$80.00, isn't that right?

A. Right.

Q. There has been an increase for that one hour in moneys you receive from the National hook-up?

A. That is right.

Q. That is true all down the line on all hook-up programs you receive?

A. Yes, except sixteen free hours we give them each week.

Q. So that for sixteen free hours they have increased your rate on the hook-up generally, isn't that it?

A. We pay actually to N. B. C., if you charge it on the hourly basis, sixty thousand dollars a year for our sustaining basis, whereas we were paid fifteen hundred dollars a month, which was much less when we take our time charges and add it up.

Q. Is your revenue from National hook-up time on the air today greater than your revenue from that same source in 1929?

A. I would say there is a difference of about two thousand dollars a month revenue.

Q. In other words, about twenty-four thousand dollars a year?

A. About twenty-four thousand dollars a year.

Q. Just on the hook-up alone?

A. That shows it in your check very definitely.

Q. What did you receive annually in gross receipts for 1938 from the National Broadcasting Company?

A. I can't tell you that.

[fol. 630] Q. You are the general manager of this company, aren't you?

A. Mr. Frohlich, I told you before I am manager of the

radio station. The radio station is a department of the Woodmen of the World Life Insurance Association, just like the receipt department and just like the insurance department for each particular state—they operate in forty-eight states, and I do not have any access to the general report of the station except at the end of the year they tell me how much the station grossed. If the president of the company that hired me don't want me to know what they are getting in net receipts in their station, it is all right with me, and I would prefer to have it that way, and as a loyal employee I should expect that.

Q. Isn't the revenue from the National Broadcasting Company the largest single item of revenue you receive?

A. No, sir.

Q. Which item is greater?

A. The local and national spot items are greater.

Q. When you speak—

A. (Interrupting) And those are for dramatic programs and news programs.

Q. How can you tell that the spot program is greater if you have no access to the books?

A. Because of the number of contracts we have.

Q. Would the number of contracts mean to you that the revenue, gross revenue, from those contracts is greater [fol. 631] than the money you received from the National Broadcasting Company?

A. It is in this respect, the National Broadcasting Company has more time over our station, there is no doubt about that, than we have locally to sell, but we get more money in return for our spot program than we do for the time allotted to the National Broadcasting Company. For instance, your Honors, for a spot program we get \$95.00 for a quarter hour, but we don't get \$95.00 every quarter hour on the network.

Q. How many hours a day of your nineteen hours do you devote to hook-up programs from the National Broadcasting Company?

A. I would say about twelve hours of the nineteen.

Q. And the revenue you derive from that source is quite substantial, isn't it?

A. Not as substantial as the other revenue.

Q. And you want to tell us now you don't even approximately know what that revenue was for 1938, in gross?

A. No; I am not supposed to know.

Q. What are you supposed to know in that company as general manager?

A. I am supposed to know everything that happens in that radio station with regard to running it properly, but I am not supposed to know about the revenue. That is for my employer to know.

Q. You are the man that goes out and obtains advertising, aren't you?

[fol. 632] A. Yes, sir.

Q. You do manage the advertising?

A. I do, but as soon as I get the contract, the job is done and I forget about his paying up at the auditing department.

Q. You know what the advertiser pays for a spot program, don't you?

A. Yes, sir.

Q. Can you tell us those figures in gross for 1938?

A. No, sir. It is around four hundred and seven thousand dollars.

Q. Where did you get that four hundred and seven thousand dollars?

A. I got that from the chief accountant of the Woodmen of the World Life Insurance Association by telephone so that I would have it if you wanted it.

Q. Well, now, who were some of your important advertisers for 1938 and 1939?

Mr. Hotz: I object to that as improper cross examination.
The Court: Objection sustained.

Q. By the way, this plaintiffs' Exhibit Number 47 is a standard work in the radio industry?

A. It is not a standard work in the industry. It is the publication of a company that puts out rates of the broadcasting stations, like it puts out the rates of the newspapers [fol. 633] for advertising.

Q. It is consulted by the people in the industry?

A. It is consulted by advertising agencies when they go about a particular spot campaign, they look in that organization's publication to find out which station he wants his products advertised over.

Q. It is a reliable publication?

A. Certainly, it is.

Q. It is reliable, isn't it?

A. Yes, or it wouldn't live as long as it has, certainly. I also talked about page 16.

Mr. Frohlich: I offer in evidence the entire document.

Mr. Hotz: Objected to as encumbering the record.

The Court: It seems so.

Mr. Hotz: Let him tear out the pages.

Mr. Frohlich: I will put in evidence pages 16 and 140 to 143, inclusive, because they contain the data with respect to Nebraska broadcasters, just those pages.

Mr. Hotz: Objected to as immaterial.

The Court: Overruled.

Q. You said something about a spot program or a spot announcement. What is a spot announcement?

A. An announcement of one hundred words or less broadcast for an advertiser over the facilities of our station to exploit his products.

Q. What is your present rate for a spot announcement?

A. It depends on the time of day.

Q. Take week days from 6:00 P. M. to 11:00 P. M.

A. A spot announcement of one hundred words would be fifteen dollars. For a chain break-in between two dramatic programs it would be fifteen dollars.

Q. And between two musical programs?

A. We have none at the present time, except two quarter hours.

Q. I am speaking of between 6:00 P. M. and 11:00 P. M.

A. Let's see. From 6:00 to 11:00 P. M. at the present time if we put on an announcement between musical programs, the rate is twenty-five dollars, and we can get about six of them in.

Q. How much do you get for the entire day for spot announcing?

A. In gross revenue?

Q. Yes.

A. I don't know.

Q. Do you pay ASCAP any part of that money?

A. We certainly do; five-per cent.

Q. Do you pay ASCAP for any church, religious, educational or political programs?

A. We used to put on political programs until you gentlemen finally decided you thought it would be well not to [fol. 635] let the politicians alone. As far as spot announcements are concerned during the day or during the evening, during dramatic programs when no music is played at all, we still have to pay you five per cent.

Q. You pay five per cent for all the time on the air for which you receive revenue, don't you?

A. Right, whether any of your music is used or not.

Q. The four hundred and seven thousand dollar figure you gave us included all spot announcements, didn't it?

A. It includes every revenue WOW has, whether from talent or time on the air; no matter what it is, for script writing, for anything we have, that is the gross. Every service of the station is included in that gross amount.

Q. Who prepares the programs in your station?

A. Mr. Harry Burk, Mr. Lyle DeMoss, production manager, and myself.

Q. Don't you employ any musical arranger?

A. We do.

Q. What is his name?

A. The musical arranger we have at the present time is Mr. Ledington.

Q. What do you pay him?

A. The orchestra pays him out of the amount we give the orchestra. That is something for the contractor of the station to pay Mr. Ledington.

Q. Is he permanently stationed in your station?

[fol. 636] A. Just as long as the orchestra wants to hire him.

Q. Have you different arrangers from time to time?

A. I think so—it is up to him.

Q. These men are skilled in music?

A. I think they are. They are musicians and make a livelihood of arranging music.

Q. They are able to do a pretty good job, aren't they?

A. I think they are.

Q. You testified on direct examination that the public domain music was very extensive?

A. It is or you wouldn't be using it yourself.

Q. As a matter of fact, the public domain contains the finest music in the world right now, doesn't it?

A. I wouldn't be competent to say it is the finest music. I think you or Mr. Paine would be better able to say. It is more extensive than your catalog, far more extensive, and as far as I am concerned I believe that if we had your organization of publishers to arrange like you have, we would have one of the finest libraries in the world, too.

Q. Well, now, with this large, extensive public domain reservoir to dip in, have you, as a broadcasting station,

ever tried to make any suitable arrangements from those public domain pieces?

A. We are doing it at the present time.

Q. Well, did you ever try to do it over the years to any extent?

[fol. 637] A. Just started it now—started about three months ago.

Q. And how do you do it?

A. Why, that is up to our particular program department. I believe we find out what is in the public domain and pick out an arrangement.

Q. And there is no trouble finding out what is in the public domain, is there?

A. No.

Q. And all you have to do is to take a piece in the public domain and turn it over to a skilled arranger?

A. It is pretty slow.

Q. Well, slow or fast, he can make a modern arrangement?

A. Yes.

Q. He can take any kind of a song and put it into swing music or a fox trot suitable for modern dancing?

A. You must realize one thing, and that is we have just started this; in fact, the industry has just started a program like it, because of the fact that we want to get away from the oppressive rates we are paying you.

Q. You can take a great many thousands of compositions now?

A. Our station only?

Q. When I say your station, I am speaking of WOW.

A. If we hired four or five thousand men to make special arrangements. Maybe you have that many.

Q. However, if you hired a sufficient number of arrangers, you could take all the public domain music and make suitable [fol. 638] arrangements for your radio needs, isn't that so?

A. Over a period of time we might be able to do that, but 1941 is coming awfully fast and when our contract is up with you.

Q. If you did that it would involve the expenditure of some money, wouldn't it?

A. Certainly; you have got to pay a man for his work.

Q. The reason you haven't done it up to now is that you have found it much cheaper to pay ASCAP to do that?

A. No. We have tried it twice and the network scuttled it both times. We started a public domain free from copyright music. First of all it was—I forget the name of the corporation we formed—in the N. A. B., and the second one, the Bureau of Copyrights, and we started that and it was scuttled, and I hope we are going to get this one over the hump.

Q. I am not talking about the N. A. B. but about your station.

A. You have got how many publishers in your organization?

Q. You are not cross examining me.

A. You have got thousands of arrangers, and it is very difficult for one radio station to get enough music in their files to present programs and compete with other radio stations at the same time and not have an infringement suit from you.

Q. Will you listen to the question? If WOW were willing to spend the money and hire suitable arrangers and men [fol. 639] skilled in music, couldn't you take a great many thousand compositions presently in the public domain and make them into arrangements that are suitable for your radio needs?

A. If we wanted to spend a million and a half dollars, sure.

Q. Isn't it a fact that you don't want to do it, and that it is much cheaper to pay ASCAP than do that?

A. No; we are going to do it, if you gentlemen don't treat us better than you have, and we are willing to spend a million and a half dollars to get to a point where we can actually go into the field, unless ASCAP says, "We want to negotiate rather than discuss".

Q. Now, you have commenced to do that as an industry, haven't you?

A. Yes, because of the oppressive rates you have placed upon us, whether we use your music or not.

Q. The National Association of Broadcasters has now formed a corporation for the purpose of doing that very thing, isn't that so?

A. To relieve ourselves of the oppressive rates you have placed upon us.

Q. And you are selling stock in that corporation to its members, including WOW?

A. That is right.

Q. Have you already purchased any of that stock?

A. No.

Q. The object of that corporation now is to provide from [fol. 640] the great fund of the public domain music sufficient music for your radio stations needs?

A. And also see if we can't purchase the catalog of Mr. Irving Berlin at a particular price if he leaves your organization. All we are interested in is the copyright performance rights; we are not interested in the music. If we get the copyright performance rights from the different publishers, they can have all the revenue and we will be perfectly satisfied.

Q. If you were able to arrange the public domain music in sufficient quantities you wouldn't get a catalog of the publishers now members of the Society, would you?

A. If we arranged the music?

Q. If you got sufficient public domain music for your needs you wouldn't need the publishers?

A. I beg your pardon. We have made popular your music and exploited your music with our facilities at no charge to you, and advertised your music for years and made it popular, and we can't say to the public it is out of the window like that.

Q. Would you want to continue using our music?

A. Certainly, at equitable rates at, we will say, so much per program and put it on a per program rate, and we will pay you that.

Q. If there were no ASCAP at all, would you still want to continue using music now owned by ASCAP members [fol. 641] and the repertoire?

A. Certainly.

Q. You would want it?

A. Yes, sir; that would be fair. I will tell you why; I would like to tell you why.

Mr. Hotz: I think the witness ought to be permitted to answer that.

The Court: I think not.

Q. In the event there were no ASCAP at all in the United States, and all the music was in the hands of the copyright owners of the American Society, you say you want to continue using that music in your radio station operations? Please tell the Court how you are going about to protect yourself against infringement in your operations.

A. Well, there is no ASCAP now?

Q. No.

A. I would go to Irving Berlin and ask him the price on his catalog, and I would go to the other members of your publishing organization and the other publishers and ask them for a price, and if there price was equitable we would play their music; if not equitable, we would deal with somebody else.

Q. Suppose there were no catalogs, how would you get the individual pieces of music?

A. If there were no catalogs?

Q. Yes.

[fol. 642] A. In other words, a restraint in trade?

Q. If there were no ASCAP and you wanted to use ASCAP music.

A. I say if there were no ASCAP the catalog owners are certainly going to try to get revenue for those catalogs, and we would buy them and pay for them—they are going to do business with us.

Q. Suppose some of those people want a great deal of money from you, what would you do?

A. We would pay for it if we thought it worth it.

The Court: This is getting into remote speculation.

Q. Did you ever see this advertisement of Lang-Worth in the Broadcasting Magazine of July 15, 1939?

A. It is the largest public domain recorded library in the world. Yes, I saw that.

Q. Do you agree that is the largest?

A. It has one hundred hours, that is all, just one hundred hours, that is all, Mr. Frohlich, and that certainly isn't enough to run a radio station today.

Q. They now propose to have two hundred additional hours.

A. That would make three hundred hours, but still it would not be enough to run a radio station on.

Q. Not on Lang-Worth alone, but it is a pretty substantial number of hours from one source?

A. A stop gap for about three weeks.

Q. You would run—

[fol. 643] A. (Interrupting:) I mean by putting in a lot of other programs of a talking nature and so forth. You couldn't run a program on any station—it is worth about fifteen minutes a day at the present time.

Q. Did I understand you to testify this morning you don't originate any programs in your studio; they are transmitted or broadcast elsewhere?

A. At the present time, no.

Q. Do you pick up music in and around the State of Nebraska and broadcast it from your studio?

A. No.

Q. Well, did you ever hear of the Music Box?

A. Yes.

Q. That is a dance hall in Omaha?

A. Yes.

Q. Have you been broadcasting any music from that dance hall over your station?

A. Yes, sir.

Q. I show you this little program and ask you whether that has been circulated around Omaha?

A. No. This was on September 14th—it was September 14th of last year. I told you last year we had three programs per week over the network. That was orchestras from Omaha—two from our studio orchestra and once a week from the Music Box—that was last year.

Q. You don't do that this year?

[fol. 644] A. No.

Q. Now, when you sell your time on the air to an advertiser, you try to convince him you have a very large listening audience, don't you?

A. Why, certainly we do.

Q. As a matter of fact, that is a most important sales argument, is it not?

A. That is our audience appreciation; otherwise, the advertiser is not going to advertise.

Q. In how many states are your broadcasts heard?

A. If broadcasting a local program?

Q. Yes.

A. I think it will reach the northern part of Kansas and the western part of Iowa and reach a portion of Nebraska, and it will reach a portion of South Dakota and I think a portion of lower Indiana and of Minnesota, and that is about all.

Q. Will it reach Detroit, Michigan?

A. No. They might be able to hear our sky-wave there, like you are able to hear Los Angeles, but that is a fluke as far as broadcasting is concerned.

Q. Today is Wednesday, September 20th, isn't it?

A. Yes, sir.

Q. On your program of the Music Box you will note, Wednesday, September 20th, 27th and October 4th. Please look at that.

A. Yes, sir.

[fol. 645] Q. Does that refresh your recollection whether that is last year's program or this year's program?

A. I will tell you this, that the advertising of this particular Music Box on here is wrong, if it is this year because we are not emanating any programs on the N. B. C. network at the present time, because the only time we did that, N. B. C. made such a rumpus.

Q. I didn't ask you that; I asked you whether it was over your station.

A. Yes, but not N. B. C.

Q. Is it your testimony that station WOW did broadcast a program emanating at the Music Box this year?

A. Network programs? If you are talking about programs from the Music Box that were broadcast locally, yes, but we don't broadcast over the network from the Music Box.

Q. So you are mistaken when you said this was distributed last year?

A. No; I said that the advertisement was wrong if they state on there we are broadcasting over N. B. C. from Omaha, because we are not and have not since last spring.

Q. But you are broadcasting over your own station?

A. We are broadcasting from the Music Box over our own station, but not on any network.

Q. When you broadcast from the Music Box you don't make any inquiry as to what musical compositions come over that Music Box program at all, do you?

[fol. 646] A. No, because we have an ASCAP license and it protects us, it is supposed to. Nobody ever brought suit—we don't know whether it does or not.

Q. Does this advertisement represent an advertisement issued by your station?

A. Yes, sir.

Q. How recently?

A. That advertisement, I think, was issued in the fall of 1937 or the fore part or the first part of 1938.

Q. Does it purport to show the coverage of your station in the surrounding territory?

A. That is where we have most of our coverage, in the six cities we dominate as far as appreciation is concerned.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 50.

The Witness: Mr. Frohlich, Mr. Searle of the Central States will disagree with that seriously.

Mr. Hotz: I object to this plaintiffs' Exhibit Number 50 as not proper cross examination, and tending to encumber the record. The exhibit I am referring to is nothing more nor less than an advertisement of the WOW station.

Mr. Frohlich: It shows the extent of the operation of this station, and the field it covers.

[fol. 647] The Court: It may be received.

Mr. Frohlich: Also offer in evidence this program of the Music Box, plaintiff's Exhibit Number 51.

Mr. Hotz: Objected to as immaterial.

The Court: I don't see the materiality of that.

Mr. Frohlich: Withdraw that offer.

Q. Have you ever read "Radio Day"?

A. No. I have read "Radio Daily" quite often.

Q. Are you familiar with some of the statistical figures of the industry?

A. No. I am familiar with our own figures from the standpoint of coverage, as I have already given you. I am not competent to speak about stations throughout the United States.

Q. Have you ever seen these figures I show you, before?

A. No, sir.

Q. Did you ever have an author and composer in the State of Nebraska come into your station and ask to have one of his songs played on your station?

A. Yes, sir.

Q. How recently did one come in?

A. Not over six months ago.

Q. Do you know the name of the particular author?

A. Yes.

[fol. 648] Q. What was his name?

A. He is a judge in the City of Omaha, Judge Palmer.

Q. He asked you to play one of his numbers?

A. That is right.

Q. Is he a member of ASCAP?

A. No.

Q. Did you play one of his numbers?

A. No.

Q. Prior to that request have there been other requests from time to time of citizens who are residents of the State of Nebraska and who have come into your station?

A. Yes, sir.

Q. Have you on occasions played such compositions?

A. They have come to us with this in mind, if we would play their selection they would be very, very willing to let us play it free so that they would be able to sell some sheet music.

Q. On the occasions that you played these compositions they were played without any performance fee?

A. That was their offer.

Q. And you accepted the offer?

A. We accepted the offer. It was not published by one of your organization.

Q. Did you ever in your life pay any composer or author a penny for performing his compositions over your station outside of ASCAP?

[fol. 649] A. Yes.

Q. And SESAC?

A. Yes.

Q. Whom did you pay?

A. I believe a gentleman out in Montana. We wanted to play his selection on a special salute and we paid him a certain amount of money, I forget what it was—he asked us to pay for it, and we did.

Q. Do you remember what you paid for it?

A. I think around one dollar or something like that.

Q. Did you ever pay any more than one dollar to an author or composer?

A. I don't think so. The general conception of the composers is that they can't get on the air unless they are members of your particular corporation, and they certainly don't want to take any exception to your organization because of the fact that they would like to belong to it some day so that they could collect fees too.

Q. Did you ever play any Davis & Schwegler music?

A. Yes.

Q. You don't pay for that, do you?

A. For the copies, yes.

Q. You pay for the transcription record?

A. We pay for the orchestrations, and they want us to

play it so that they can compete with you, and that is the reason why we play it for them.

[fol. 650] Q. You don't pay them any fee for performing for profit in your organization, do you?

A. We will have to pay them if we continue to use their music.

Q. Are you paying them presently?

A. No. They said, "Here, play this for a while and see if it becomes popular, and if there are many requests for it, and if you do, we will come back and strike a bargain."

Q. You do popularize some of them by playing them?

A. Certainly, for years.

Q. And you can popularize a great many other compositions by playing them constantly?

A. Yes.

Q. You could take the compositions in the public domain and make them quite popular, if you wanted to?

A. Yes, but it would take a million and a half to do it.

Q. You don't want to spend a million and a half dollars, is that right?

The Court: This has been gone over so often gentlemen.

Q. Did you ever receive any communication from ASCAP offering to give you an index of musical compositions?

A. A card file, but that is not your catalog.

Q. Did they offer to give you a list of musical compositions which were publicly used by radio broadcasters?

A. They will send any radio station now a catalog of [fol. 651] tunes by placing stickers on what ASCAP thinks is popular. That is not what we believe is popular. We make it popular for you. We want your catalog and then we can do business with you, but we don't know what we are buying from you gentlemen.

Q. Have you ever accepted the offer of ASCAP to take one of these collections of musical compositions?

A. You mean this card file?

Q. Yes.

A. Which is sent out to radio stations?

Q. Have you ever taken them up on it and asked for it?

A. I think it is laying around some place, but it is nothing to us.

Q. It was offered gratis?

A. If we bought files and kept them up and so forth. It

was like paying for books fifteen dollars a month and paying for them in seven years.

Q. Do you know how many compositions there are in that list at the present time?

A. No, I have never inquired because it wasn't the catalog—I want your catalog.

Q. Have you ever been sued for infringement by anybody for performing without any right or authority any musical composition on the air?

A. We were joined in one suit in 1932, a certain composer in Europe sued us as well as the National Broadcast-[fol. 652] ing Company for broadcasting over our station; that was the only time. We were threatened by Warner Bros. when they dropped out of ASCAP, and we had to pay them an additional nine hundred dollars for the use of their music until we got their own catalog straightened out and deleted.

Q. This suit in 1932 was by a composer not a member of ASCAP?

A. No, but the National Broadcasting Company made settlement with him.

Q. Have you ever been sued by anyone for infringement of any compositions owned or controlled by members of ASCAP?

A. No, except that Warner Bros. threatened us with suit for infringement at the time you claimed they were still in your group, but still we had to pay them nine hundred dollars.

Q. As a matter of fact, you know Warner Bros. were out of the membership of ASCAP for a six-months period?

A. Yes, but you claimed that any suits brought you would be pleased to fight.

Q. And were any suits brought?

A. No, because you made a deal with Warner Bros. and got them back in, and you got Joe Malec back in.

Q. During the period Warner Bros. was out of ASCAP did you continue to use any of their compositions?

A. For the first three months we did, and then last three we didn't.

Q. When you did, you knew you had no right to do it? [fol. 653] A. We certainly did; we paid three hundred dollars a month for it.

Q. There is a station in Omaha called KOIL?

A. Yes, sir.

Q. Do you know of your own knowledge whether the transmission comes in from Nebraska or from Iowa?

A. You mean network service or their own transmission?

Q. Yes.

A. Their own transmitter is located on the Iowa side of the river.

Mr. Frohlich: That is all.

Redirect examination.

By Mr. Hotz:

Q. Mr. Gillin, attached to some of the depositions that were taken there are a large number of catalogs that were called for in the interrogatories and in the depositions of the various publishers of ASCAP music, one of them is Exhibit Number 5 to the depositions and another one is 7-A, thirteen booklets of Carl Fischer, another one is Exhibit 2-B of Fischer, another one is 2-C of Fischer, and Exhibit Number 7-O of Carl Fischer, and another one Exhibit 7-E of the same publishing company, another one 7-F, another one 7-G from the same company, and 7-A and 7-D and 7-K, 7-L, 7-M, and then in Irving Berlin's another one 5-A, and I will ask you to just tell us briefly without exam-[fol. 654]ining those what those are? Take, for example, the first one here, the copyrighted musical works of Irving Berlin, Inc.

The Court: Doesn't it already appear in the testimony?

Mr. Hotz: Not what I want to bring out, your Honors please.

A. It states it is a catalog of copyrighted music of Irving Berlin, Inc.

Q. It has been testified to here that the copyrights are owned by Irving Berlin in this catalog, that is, the composers and Berlin have made a deal and the copyrights are vested in this organization, Irving Berlin, Inc., so far as these numbers are concerned. Now, the question was asked you in connection with the event of ASCAP being dissolved or going out of business or being declared an unlawful monopoly, what then would you do, for example, in connection with Irving Berlin music if you wanted Irving Berlin music. Who would you then deal with if you didn't have ASCAP to deal with?

A. With Irving Berlin, Inc.

Q. For the public performance rights?

A. Yes, sir.

Q. And what about the other publishing houses?

A. I would deal with them each individually.

Q. And would you attempt to negotiate and select from his catalogs the pieces you wanted the public performance [fol. 655] rights and attempt to negotiate for the price that they would charge for public performance rights in the State of Nebraska for those pieces?

A. Yes, sir.

Mr. Frohlich: I move to strike out the answer, and object to the question as already having been testified to.

The Court: I think it has been. Sustained.

Q. That would be true in connection with all these other catalogs of the members of ASCAP called for in this suit, and some of which have been furnished, is that right?

A. Yes, sir.

Q. In other words, it would throw open to you an opportunity to go and shop and deal from one of these big publishing houses to the other and pick out what you wanted in connection with vocal and instrumental music for public performance purposes, is that right?

A. It would open up the competition of these particular publishers for their particular catalogs on the air.

Q. Is there a difference in the style and kind of music these various publishing houses put out, some better and some not so good?

A. I think one catalog, obviously, is worth more than another.

Q. Do the different publishing houses have different styles of music, different kinds?

[fol. 656] A. I imagine they do, but I have never examined that closely. When you are going out to compete in the open field you are going to decide what catalogs you are going to buy, and you are going to buy a certain type of music to take care of the desires of your radio audience.

Q. Would it be beneficial to your organization to have the right and privilege of building up your own musical library from the published works of the publishing houses so that you wouldn't have to go into the publishing business?

Mr. Frohlich: I object to that.

The Court: Objection sustained as argumentative, calling for a conclusion, and speculation.

Q. In connection with the question that was put to you by counsel on cross examination about the power and authority of the committee of the National Broadcasting Association, the last committee in dealing with ASCAP for contracts, I do not think you answered whether or not that committee of the National Association of Broadcasters has any authority or power to deal for WOW or any of these stations in Nebraska and bind them to any agreement of any nature or kind with reference to that.

Mr. Frohlich: Just what committee do you mean?

Mr. Hotz: The last committee he spoke about.

[fol. 657] Mr. Frohlich: He spoke about committees in 1932.

The Court: That is so indefinite. Objection sustained.

Q. Was there a committee in 1934 that you spoke about?

A. I spoke about a committee appointed by the Board of Directors to carry out the discussions with ASCAP in regard to renewing the ASCAP contracts of 1932 and 1934.

Q. When was that appointed?

A. The first one in 1932 and the second one in 1934, and third one appointed, I imagine, around four or five months ago.

Q. In that last committee that was appointed have they any authority to bind station WOW in connection with any dealings it might have with ASCAP?

A. No. In explanation I should say this as to what authority the committee has. The committee is appointed by the Board of Directors to carry on discussions with ASCAP, and if they believe that they have got a contract from ASCAP where we can pay on a program that is to be paid for at the source, and the broadcasters will pay ASCAP for only such music as they use on their programs, that is, ASCAP music and records, on a per program basis, then they will come back to the industry and offer it to each individual broadcaster, and then it is up to that broadcaster whether he wants to take that contract with ASCAP or not. [fol. 658] In other words, it was appointed to carry on for the industry, but it has no right to act for any individual broadcaster in the United States.

Q. And that goes for the Nebraska stations?

A. Every station in Nebraska.

Q. In order to prepare music for use of WOW station from the public domain, would it be necessary—I am speaking now for WOW alone—for you to enter into the publishing field?

Mr. Frohlich: I object to that. It has already been testified to.

The Court: Sustained.

Q. Does it take special machinery and equipment to publish musical compositions?

A. Yes, a great lot of it.

Mr. Frohlich: I object to that.

The Court: Objection sustained, and the answer stricken out.

Mr. Hotz: That is all.

Recross-examination.

By Mr. Frohlich:

Q. Look at this again. Isn't this the exact copy of the contract?

A. I wouldn't want to say unless I took the contract and compared it with you. I will be glad to send it to you, and let the Court compare it.

[fol. 659] Mr. Frohlich: That is all.

Mr. Hotz: We wanted the number of radios in use in the State of Nebraska.

The Witness: I will be glad to send that to you.

If it please your Honors, I was subpoenaed by ASCAP and I would like to be released.

Mr. Frohlich: You are released of your duties.

Witness excused.

[fol. 660] RAYMOND HEDGES, was called as a witness on behalf of the defendants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Hotz:

Q. State your name.

A. Raymond Hedges.

Q. What is your business?

A. Manager of a hotel.

Q. Which one?

A. Capitol Hotel.

Q. Lincoln, Nebraska?

A. Lincoln, Nebraska.

Q. How long have you been in that capacity?

A. A little over a year.

Q. Have you in the past year as manager of that hotel had any dealings with the representative of ASCAP, and if so, when and give your experience?

A. I did in February of 1939.

Q. With whom did you deal?

A. Eugene Blazer.

Q. Give the facts surrounding your transaction that you had with him.

A. Mr. Blazer called on me sometime in February, I for-
[fol. 661] get the exact date, at the hotel, and asked if we were having music in our coffee lounge of an evening. I informed him we were, and he told me he was the attorney-at-law, I believe, representing ASCAP, and he went on to explain what ASCAP was, and that in order for us to continue our music we would have to pay a sum of a hundred and twenty-five dollars.

Q. How many pieces of music did you have in there?

A. Four pieces of music.

Q. What did you do?

A. We discontinued the music—times were tough and we couldn't afford to pay the hundred and twenty-five dollars.

Q. Did you again start up that music later on?

A. Yes.

Q. When?

A. Around in April.

Q. What was the experience at that time?

A. We ran about a week before we were called on again.

Q. By Mr. Blazer?

A. Yes, sir.

Q. What did he say at that time?

A. He told us at that time if we did not pay the hundred and twenty-five dollars we would be sued by ASCAP.

Q. Then what did you do?

A. We discontinued music and haven't had music since—we couldn't afford it, and cut out the music in the hotel.
[fol. 662] We can't afford to pay a hundred and twenty-five

dollars to ASCAP, because it is tough enough to pay the musicians. You have to watch all those things.

Mr. Hotz: That is all.

Cross-examination.

By Mr. Frohlich:

Q. What did you pay your musicians?

A. The union scale.

Q. How much is that?

A. \$24.50 a week set up by the union.

Q. For one man?

A. Yes, sir.

Q. How many men were there?

A. Four men.

Q. That is a total of almost one hundred dollars, isn't it?

A. Yes, sir.

Q. And at the rate of a hundred and twenty dollars a year, it would be almost three dollars a week?

A. Yes, sir.

Q. You couldn't afford to keep music in your establishment for three dollars a week when you were paying your musicians one hundred dollars?

A. In addition, no.

Mr. Frohlich: That is all.

[fol. 663] Redirect examination.

By Mr. Hotz:

Q. How many hours a day did the musicians play?

A. Three hours a day, 9:00 to 12:00.

Q. What times of the year?

A. October until the first of June.

Mr. Hotz: That is all.

Mr. Frohlich: That is all.

Witness excused.

[fol. 664] EDNA M. HEDLIN, was called as a witness on behalf of the defendants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Hotz:

Q. State your name.

A. Edna M. Hedlin.

Q. Where is your home?

A. Omaha, Nebraska.

Q. What is your position?

A. Treasurer of the Eppley Hotels Company.

Q. How long have you been treasurer of that company?

A. About six years, I imagine—I don't know offhand.

Q. How long have you been identified with the Eppley Hotels Company?

A. Eighteen years.

Q. In the State of Nebraska what hotels are operated by the Eppley Hotels Company?

A. The Fontenelle Hotel, the Rome Hotel and the Logan Hotel.

Q. How many in Lincoln?

A. The Capitol Hotel and the Lincoln Hotel.

Q. And elsewhere in Nebraska, where?

A. The Norfolk at Norfolk, Nebraska and the Evans at Columbus.

Q. Do you also operate other hotels outside of the State [fol. 665] of Nebraska?

A. Yes, we do.

Q. Altogether, how many?

A. Eighteen in all.

Q. Are the headquarters of that hotel organization located in Omaha, Nebraska?

A. Yes, sir.

Q. Now, Miss Hedlin, how many of the hotels in the State of Nebraska are operated under license with ASCAP?

Mr. Frohlich: I object to that. She doesn't know.

Mr. Hotz: I beg your pardon.

Q. Under whose jurisdiction or whose job is it to deal with ASCAP in your organization?

A. I, myself, have been dealing with them.

Q. Who is the man you had your negotiations with, so far as ASCAP is concerned?

A. Mr. Blazer.

Q. Are you familiar with the records and files and so forth of the Eppley Hotels Company in connection with ASCAP in its hotel business in the State of Nebraska?

A. Yes, sir.

Q. And that is under your jurisdiction and part of your job?

A. Part of my duties, yes, sir.

Q. Now, which of your hotels at the present time are under contract with ASCAP?

[fol. 666] A. The Fontenelle Hotel.

Q. At Omaha?

A. Yes, sir.

Q. Now, how much are they paying at present?

A. The contract?

Q. Yes.

A. Three hundred and sixty dollars a year.

Q. In the employment of musicians, how do the musicians work for the Eppley Hotels Company in the hotels where they happen to be, the Fontenelle or elsewhere; are they paid as employees of the hotel, or otherwise? Are you familiar with those contracts and arrangements?

A. They are not employees of the hotel.

Q. How is that done?

A. There is one head man of the orchestra and we deal direct with him by contract.

Q. You pay a social security tax for those musicians?

A. No, sir.

Q. You do not?

A. No, sir.

Q. Have you had any negotiations with Mr. Blazer in the last year or so with reference to any other hotels besides the Fontenelle?

A. I discussed the Capitol and Rome with him.

Q. What was said by him and said by you in connection with the Capitol Hotel in Lincoln?

[fol. 667] A. Well, he came down later and dealt directly with Mr. Hedges. He inquired of me if they were playing music at the Capitol, and I said I presumed they were having some music and trying to increase their revenue, or get some business there. He dealt directly with Mr. Hedges—you heard what Mr. Hedges said previously.

Q. And it resulted in the discharge of the musicians. You couldn't make arrangements with Mr. Blazer, so you discontinued the music?

A. Had to cut expenses wherever possible.

Q. Have you done that in other hotels of yours in the State of Nebraska and for the same reason?

A. Well, no, we just didn't enter into music, because we figured we would get into the same difficulty and didn't want to take the chance.

Q. Now, Miss Hedlin, is the Fontenelle Hotel interested in building up a library of music of their own?

A. Yes, if they have the opportunity.

Q. What would you like to do in that regard, if you could?

Mr. Frohlich: I object to that.

The Court: Sustained.

Q. When these musicians are employed by the Eppley Hotels Company do you have any control over the selection of music that the orchestra plays?

A. They arrange their own programs—their own dance music.

Q. That is their business, largely?

[fol. 668] A. Yes; that is in charge of the head musician.

Q. Have you ever asked Mr. Blazer for a catalog of the music they claimed in these matters you have had up with him?

A. I have asked him on the phone, in a telephone conversation that I would like to be supplied with a catalog which would be helpful in refraining from using a list of different numbers.

Q. Did he furnish you with such a list?

A. No, I never did receive it.

Q. In your hand do you have a copy of a letter that you wrote to Mr. John C. Wooden, general counsel for the American Society of Composers, Authors and Publishers at Des Moines, and signed by yourself? Is this a form of letter that you have used in connection with your dealings with ASCAP, this form here on defendants' Exhibit Number 51?

A. That is right.

Q. Is this in the form and manner in which you asked for this information of Mr. Blazer?

A. I discussed it with him on the telephone along the same lines.

Q. The same information contained in that letter?

A. Yes, sir, practically the same; I couldn't say word for word.

Q. Now, do you have in your hand a form that was sent out to you by Mr. Blazer's office? This one also happens to be from Des Moines. Is that the same as the one he has [fol. 669] here in Nebraska, the same thing?

A. It appears to be the same.

Q. Calling your attention to defendants' Exhibit Number 52, is this the form and the letter that has been sent to you in Omaha, that is, the Eppley Hotels Company, in connection with refraining from infringement?

A. We have received application forms, yes.

Q. And signed by ASCAP on this printed form?

A. Yes, sir.

Q. On one part of this it gives—

Mr. Frohlich: I object to reading any more of this instrument, unless it is offered in evidence.

Mr. Hotz: Offer in evidence defendants' Exhibit Number 52 as part of the examination of this witness.

Mr. Frohlich: No objection to that.

Mr. Hotz: Exhibit Number 52, I will read to the Court.

(Defendants' Exhibit Number 52 read).

Q. Now, that came to you, did it not, in the usual course of the mails from the American Society?

A. Yes, sir.

Q. Now, in response to that did you then write a letter or communicate this letter, Exhibit Number 51, to ASCAP?

A. By telephone.

[fol. 670] Q. To Mr. Blazer?

A. Yes.

Q. But this one went where?

A. This went to Mr. Wooden at Des Moines.

Mr. Hotz: I will offer in evidence Exhibit Number 51.

Mr. Frohlich: No objection.

(Exhibit Number 51 read).

Q. Now, Miss Hedlin, has the National Association of Hotels ever been authorized to negotiate for you in any particular with ASCAP?

A. No, sir; they have nothing to say about our music contracts.

Mr. Hotz: That is all.

Cross-examination.

By Mr. Frohlich:

Q. Miss Hedlin, how long has the Eppley Hotels Corporation had a license with the Fontenelle Hotel, how many years?

A. Well, I would say off and on from 1924 to 1935.

Q. In other words, about fifteen years?

A. Off and on.

Q. The Fontenelle is a very large and spacious and beautiful hotel in Omaha, isn't it, insofar as hotels are concerned?

A. Yes, sir.

Q. In all those fifteen years you had no trouble with any [fol. 671] body suing you for infringement of music which was played in your hotel, have you?

A. No, sir.

Q. Why were you so anxious to obtain a catalog of all ASCAP members' compositions in May, 1939?

A. In connection with the other hotels in Nebraska, because the smaller hotels were trying to engage orchestras to increase their business, naturally.

Q. You have gotten along pretty well without any catalog at the Fontenelle, haven't you?

A. Well, we didn't request it until we got in this other difficulty.

Q. Nobody bothered you or sued you, and you had no difficulty in fifteen years?

A. There was no other course—we had to pay.

Q. And you paid, and you were let alone, is that right?

A. They demanded pay, and all we could do was pay.

Q. Who paid?

A. We had to pay.

Q. And nobody bothered you after you paid?

A. No.

Q. Did anybody sue you?

A. No, because we had to pay—they demanded it.

Q. Didn't somebody suggest to you in May, 1939 that you write a letter to ASCAP demanding a catalog?

A. Oh, not demanding.

[fol. 672] Q. Or asking for it or requesting it?

A. It was suggested.

Q. Who gave you that suggestion, Miss Hedlin?

A. Our attorney.

Q. What is his name?

A. We have several attorneys.

Q. Which particular attorney gave you that suggestion?

A. I discussed it with Mr. Hotz.

Q. And Mr. Hotz is one of your attorneys?

A. Yes, sir.

Q. Was he the gentleman who suggested to you that you write that letter in May?

A. He suggested I do it in connection with some of the Nebraska and Iowa hotels, and we had to get some relief for the eighteen hotels, and it is too expensive to have this burdensome additional expense.

Q. Your company operates the Rome Hotel in Omaha?

A. Yes, sir.

Q. Have you been employing an orchestra in that hotel?

A. When we could afford it—off and on.

Q. Have you been doing that for the past year?

A. Off and on, yes, sir.

Q. For a period of how long at a time?

A. Probably two or three months, and then the business got so bad we would discontinue them.

Q. During those two or three months did you have a [fol. 673] license from the owners of the copyrights or ASCAP or anybody else in the world to perform musical compositions performed at the Rome Hotel?

A. I talked with Mr. Blazer about it.

Q. Didn't Mr. Blazer tell you you ought to have a license for that hotel?

A. He said it would be included with the Fontenelle.

Q. He asked you to include it in the Fontenelle and pay specifically for the Rome as well as the Fontenelle?

A. He said one would take care of both hotels.

Q. As a matter of fact did you make any agreement or any contract with Mr. Blazer or ASCAP for any license to perform the music in the Rome Hotel?

A. I never made a contract on the Rome.

Q. Are you using music at the present time?

A. I guess they are right now.

Q. You have an orchestra of how many people?

A. Two people.

Q. It is not a very large orchestra?

A. Just an organ.

Q. Are two people playing?

A. An organ and a singer.

Q. And they perform in what room of the hotel?

A. In the bar grill.

Q. And they perform there now every night, don't they?

A. Yes, sir, every night.

[fol. 674] Q. Two or three hours?

A. 6:00 until midnight—6:00 to 7:00 and then 9:00 to 12:00.

Q. They perform a great many of the popular compositions of the day, don't they?

A. Well, I presume they do—I haven't heard them.

Q. Have you made any attempt to inform yourself with respect to music which is performed at the Rome Hotel?

A. We leave that up to the leader who made the contract.

Q. Who is the leader; is he the organist?

A. I couldn't tell you.

Q. Well, have you talked to him about the music you are playing there?

A. No, I never discussed it with him.

Q. Don't you know you are playing music, the performing rights of which belong to somebody else? You know that, don't you?

A. Well, I know, but we have been requested—

Q. Well, didn't Mr. Blazer request you to take out a license for this music, or stop playing it?

A. No.

Q. Didn't you testify he suggested you pay something for that?

A. You misunderstood me. He said the Fontenelle fee would cover the Rome. He didn't want to reduce the Fontenelle fee. We thought it was too high.

Q. He suggested that instead of reducing it that you leave it stand as it is and include the Rome Hotel?

[fol. 675] A. Right.

Q. Did you draw any contract on that basis?

A. No, we have no contract.

Q. Well, now, I show you a copy of a letter which is addressed to the Eppley Hotels at 1804 Dodge Street, Omaha, Nebraska, under date of January 25, 1938, and ask you, Miss Hedlin, whether you received the original of that letter?

A. It is so far back I would have to look in the files. It is not addressed to any particular person.

Q. Wouldn't you in the ordinary course of business look at the mail that came in?

A. The secretaries open the mail.

Q. Did you receive a letter on or about May 12th or May 13, 1939, addressed to the Eppley Hotels Company, 1804 Dodge Street, Omaha, Nebraska?

A. This is in connection with the Capitol Hotel.

Q. Is that one of the hotels owned by you?

A. Mr. Hedges has testified about the Capitol—it has nothing to do with the Rome.

Q. Let me direct your attention to the second paragraph of this document: "The Hotel Room at Omaha"—obviously means the "Hotel Rome"—

A. I just testified a minute ago that we said the rate was too high and it ought to include the Rome Hotel.

Q. Did you ever get the original of this letter?

A. I presume I did, because I talked to Mr. Blazer since [fol. 676] then.

Q. After you received this letter?

A. That is evidently where I got the idea the rate was too high, and wanted the rate reduced to include the Rome.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 53.

Mr. Hotz: If the other one went in, there is no objection to this one.

Q. Do you recall this particular paragraph in the letter: "The Hotel Room (Rome) at Omaha also does not have a license from this Society to perform the copyrighted works of its members publicly for profit. We have taken up the matter a number of times with your office and have been unable to elicit a response.

"Miss Hedlin told the writer a few days ago she thought the rate on the Fontenelle Hotel was too high, or that it ought to include the Rome Hotel. We advised Miss Hedlin, as we have advised your company a number of times, that every contract we write is on a particular establishment; that if your company thinks that any rate is too high, you may take up directly with the Society the matter of the negotiation of a lower rate. The writer does not attempt to write contracts with hotels, but the matter of contracts with hotels is dealt directly with by the Society. He has even sent in forms to be used, and suggested the taking

up of the matter directly with the Society." Do you recall [fol. 677] that statement in the letter?

A. I talked to Mr. Blazer.

Q. After you read this letter you talked to Mr. Blazer?

A. We had a verbal understanding the two would be included as one.

Q. That was a verbal understanding between you and Mr. Blazer about including the two?

A. That is my understanding. Nothing was done since May, 1939.

Q. Is it your understanding there is some verbal arrangement about it?

A. I think shortly after that the orchestra was discontinued because in the summer months, July and August, there was no music at the Rome any more, and shortly after that music was discontinued and it has not been brought up since.

Q. Is it now your claim there exists a contract between your company and ASCAP under which you are licensed to perform music at the Rome Hotel, is that your claim?

A. According to verbal conversation is all.

Q. Is it your claim under a verbal contract?

A. Yes, sir.

Q. Can you fix the time and place where that arrangement was made?

The Court: I don't see the materiality.

A. I think my office can.

Mr. Frohlich: That is all.

Witness excused.

[fol. 678] (Short recess.)

DON SEARLE was called as a witness on behalf of the defendants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Hotz:

Q. State your name.

A. Don Searle.

Q. Mr. Searle, where do you reside?

A. Omaha, Nebraska.

Q. What is your business?

A. I run KFAB, KOIL and KFOR.

Q. In what capacity?

A. As general manager.

Q. How long have you been general manager of those stations?

A. Since a year ago January 1, 1938.

Q. Where is KOIL located?

A. At Omaha.

Q. Where is KFOR located?

A. Lincoln.

Q. KFAB?

A. Lincoln.

Q. Those stations are owned by one company, are they?

A. Three separate corporations, KFAB Broadcasting [fol. 679] Company, the Corn Belt Broadcasting Company, and the Central States Broadcasting Company, the Central States being KOIL, and the Corn Belt being KFOR.

Q. Were you in the radio business prior to the time you became manager of these three stations?

A. Been in it since 1925.

Q. What was your prior experience?

A. We owned KOIL, the family owned it, and sold it out in about 1932, and I went with Senator Capper who ran the radio station at Topeka, Kansas from January 1, 1933 to January 1, 1938, at which time I came up here.

Q. Do any of the three stations have an affiliation and contract with the Columbia Broadcasting Station?

A. Two of the stations have definite contracts with Columbia, KFAB and KOIL—both basic Columbia stations.

Q. Columbia is a network, is it not?

A. It is.

Q. What is it popularly known as, what network is that?

A. The Columbia network.

Q. In connection with KFOR located in Lincoln, where is the mechanism of that station located?

A. In Lincoln, Nebraska.

Q. Does the Columbia come in over a wire?

A. Are you speaking of KFOR or KFAB? KFAB comes in over a wire from New York and delivered to our studios in the Lincoln Hotel.

[fol. 680] Q. What do you do with it there?

A. Send it over our line and transmitter at the State

Fairground and put it through our transmitter and broadcast it.

Q. Would the programs come over the State of Nebraska, for example, if it were not for your station that is located out at the Fairgrounds, Lancaster County?

A. If it were not broadcast by KFAB it would not be heard over the State of Nebraska.

Q. Just generally you may state what machinery and equipment you have at the station out at the Fairgrounds, just generally.

A. Well, we have a ten thousand watt transmitter and proper ground and antenna system, all of which constitutes what we consider a transmitting plant. The program is sent over the wire to the transmitter and there put into radio energy and later picked up by the radio receiving sets in the homes, and then brought into sound waves.

Q. Now, do you have a contract with the ASCAP people?

A. We do.

Q. For each one of the three stations?

A. Right.

Q. Can you tell us about what you pay ASCAP to the three stations separately or together?

A. You want to know in dollars what we pay?

Q. I think so.

[fol. 681] A. In 1938 for KFAB we paid \$11,563.75; KFOR, \$2,347.10; KOIL, \$7,868.12; total \$21,778.97.

Q. What went to make up those figures?

A. First, they charge a sustaining fee.

Q. Of how much?

A. I don't have our monthly figures here. As a matter of fact, we don't separate it on our regular statement, but on KFAB it is \$250.00 a month sustaining fee. I can't give it to you. Over and above that we pay five per cent on everything in the way of net revenue received for the station, in the operation of the station, whether it is baseball games which go on from 3:00 to 5:15 at night, two hours and fifteen minutes in the afternoon, or dramatic shows.

Mr. Frohlich: I object to that. The contract speaks for itself.

The Court: It has been gone over anyway. I assume the contracts are all the same, substantially.

Q. Are there any of your stations that are exempted from the five per cent?

A. Political broadcasts only, and, of course, talent—things other than actual sale of time.

Q. Did you hear Mr. Gillin's testimony in connection with the method of arriving at the amount paid ASCAP by WOW?

A. I believe I heard all his testimony.

[fol. 682] Q. Yours is on the same basis?

A. Do you mean we pay on the same basis as they do?

Q. Yes.

A. We do.

Q. Now, Mr. Searle, do you have a contract with the Columbia Broadcasting Station network?

A. I do.

Q. Do you have that with you?

A. Yes, sir; here is probably what you want—Section 5, Paragraph 5.

Q. This paper here, this Affiliation Agreement between Columbia Broadcasting System of New York and the Central States Broadcasting Company, station KOIL at Omaha, Nebraska, their date of April 25, 1938, and it is signed by your company, is it not, by the vice-president?

A. Yes; Mr. C. L. Carfer.

Mr. Hotz: We would like to offer in evidence this contract, being defendants' Exhibit Number 54, but this is the original and I would like to have permission to substitute a copy therefor.

Mr. Frohlich: No objection.

The Witness: Do you want to submit that one page?

Mr. Hotz: We will see. That is all I am interested in, is that one section, Section 5.

[fol. 683] Mr. Frohlich: I have no objection to the entire contract going in.

Mr. Hotz: We will furnish the entire contract.

Q. Now, calling your attention, Mr. Searle, to Section 5.

A. It is Paragraph 5.

Q. On Page 2.

A. Yes, sir, that is right.

Mr. Hotz: I particularly call the Court's attention to this section: "The station will maintain and operate its facilities in accordance with the best practice in the broadcasting art and conduct of the industry and in accordance with good engineering practice, and will maintain such

licenses under copyrights as are necessary to enable the station to broadcast the programs to be furnished by Columbia."

Q. On this contract with Columbia are there any of the services that you use that are cleared at the source, that emanate in New York from Columbia?

A. It is my understanding that all musical selections are cleared at the source with the Columbia Broadcasting System, with the exception of those with ASCAP.

Mr. Frohlich: Just a moment. I move to strike that out because he said it is his understanding. I object to any understanding.

[fol. 684] The Court: I think he is qualified, probably.

Q. In connection with this contract that is in evidence here with ASCAP, is that a satisfactory contract with your station?

Mr. Frohlich: I object to that on the ground that it is incompetent, irrelevant and immaterial, whether or not it is satisfactory.

The Court: Objection sustained.

Q. How does it come this contract with ASCAP was entered into with your stations?

Mr. Frohlich: I object to that for the same reasons. The contract is in evidence.

The Court: Objection sustained. We went broadly into these matters with another witness.

Q. You heard the testimony of Mr. Gillin in connection with the developments leading up to the contracts, and his statements in connection with the objectionable features, did you?

A. I did.

Q. Do you agree with Mr. Gillin in regard to the objectionable features as claimed by him in connection with the contract with ASCAP, or not?

Mr. Frohlich: I object to that, your Honors.

The Court: Overruled.

A. I agree with him, absolutely.

Q. Would you be able to operate your station or any one of your stations without the ASCAP music and comply with

[fol. 685] the demands on your station for musical entertainment?

Mr. Frohlich: Objected to as speculative, and incompetent and irrelevant.

The Court: I think it is. We have gone into that so fully. The views of the claims and so forth are covered, and it is also an opinion and argument.

Q. Would your experiences in that regard be along the same lines as testified by Mr. Gillin whom you heard in the court room this morning?

Mr. Frohlich: I object to that as cumulative.

The Court: You may answer.

A. Yes. Your question was, would our experience coincide with the testimony by Mr. Gillin in that respect?

Q. Yes.

A. That is right.

Q. Of course, there is no connection between his station or yours, either by ownership of stock or otherwise?

A. There is no connection.

Q. You are in open competition with him?

A. Yes, sir.

Mr. Hotz: I think that is all.

Cross-examination.

By Mr. Frohlich:

Q. Mr. Searle, when did you get a SESAC license for your station?

[fol. 686] A. When?

Q. Yes.

A. I cannot answer that. It was before I came here.

Q. How many years ago would that be?

A. I have been here since January 1, 1938.

Q. Have you ever looked at the SESAC contract?

A. To be perfectly frank, I have not. We have had a SESAC contract before, and I know the general provisions of it.

Q. You know the general provisions of that contract?

A. Yes, only the general provisions, not detailed.

Q. Let me direct your attention to this provision, Paragraph 7.

*The Court: In what exhibit?

Mr. Frohlich: I am reading from Exhibit Number 1 of defendants' Exhibit Number 46.

Q. "The right to broadcast any musical compositions granted under this license extends only to licensee broadcasting from the station (s) licensed under this agreement or from any other place (s) of origin duly licensed by licensor, and licensee may not relay and/or transmit in any manner whatsoever for re-transmission and/or re-broadcasting or otherwise, performances of said musical compositions, to any stations in a hook-up or network or otherwise, unless such stations have duly secured licenses from licensor." Do you know about that provision?

A. I am not acquainted with that thoroughly, but I can imagine that.

[fol. 687] Q. You think there is a similar provision in your contract?

A. I can't say.

Q. Don't you know that every contract is uniform?

A. I don't know.

Q. And particularly the Columbia chain has the identical contract which I have read to you and which appears in this exhibit?

A. I don't know they do.

Q. You still maintain the broadcasting from the Columbia station of SESAC was cleared at the source?

A. It is my understanding it was all cleared at the source, with the exception of ASCAP.

Q. Where did you get that?

A. In talking with the boys at the broadcasting meeting.

Q. What meeting?

A. In general.

Q. Did you ever talk to anybody connected with Columbia?

A. No.

Q. Did you ever talk to Mr. Klauber?

A. No.

Q. You never mentioned the subject to him?

A. No.

Q. How many years have you been operating broadcasting stations?

A. Since 1925.

Q. Suppose there were no ASCAP, how would you go

about protecting yourselves against infringement by people who now own copyrights and musical compositions which are in the ASCAP repertoire?

A. Along the same procedure as so far in my testimony—follow much along the same lines as John Gillin.

Q. Would you make any attempt to contact any particular owner of a particular song if you wanted that song for your program?

A. I suppose if we wanted that song for our program we would probably make an attempt to contact the owner of that particular song.

Q. Would you negotiate for a license with him?

A. It would probably amount to as much.

Q. How many pieces of music do you play a day in your stations?

A. Do you mean over the station we originate ourselves?

Q. Yes.

A. I suppose one hundred.

Q. And that is played about every day, on the average?

A. Something like that.

Q. Now, at the present time you don't concern yourselves with the ownership of any copyrights of the numbers broadcast from stations?

A. Not particularly, because we sign up with everybody that comes along with a threat against us.

Q. Did you ever sign up a contract with any individual composer or writer for the broadcast of his composition over your stations?

[fol. 689] A. Not to my knowledge.

Q. Did you ever pay any author or composer in this country or in the State of Nebraska any money for the right to broadcast his composition?

A. Not that I recall, but we have played selections the composers have asked us to play.

Q. Have you played many selections of that kind?

A. No, not many as numbers go—we haven't been approached very much.

Q. But in many instances you have played such numbers, haven't you?

A. Yes, sir.

Q. Did you ever pay anything for them?

A. No. They asked us to play them in order to popularize the number.

Q. You have no control over the numbers that come in over the chain network, have you?

A. In effect, that is right.

Q. You don't ever know in advance what numbers that are going to come in?

A. That is generally true.

Q. Do you ever ask the network for a list of compositions that are going to be played on your station?

A. No; we think we are pretty well covered with every license we can get.

Q. And you think you are pretty well covered because [fol. 690] of the ASCAP license?

A. And every other one.

Q. What others have you got besides ASCAP?

A. ANPA and several recordings as well.

Q. The recording catalog?

A. Yes, sir.

Q. What do you pay them?

A. I don't have the exact figure here, but it is very small.

Q. What did you pay SESAC in 1938?

A. Less than ten per cent of what we pay you.

Q. How much would that be?

A. We paid them a total of \$1570.04 for our three stations. I can't answer that definitely as being such. We have in our form here a place for ASCAP and a place for SESAC, and I know that ASCAP is under ASCAP, but I am not sure but what miscellaneous licenses are under our accounting form for SESAC, and that may be a total of all.

Q. You heard Mr. Gillin testify this morning he thought the public domain was very extensive, didn't you?

A. Yes, sir.

Q. Do you agree with him?

A. I understand there are quite a number of pieces in the public domain if you want to go to the trouble of finding out what is in the public domain and getting your instrumentation figured out so that you can use it.

Q. Did you ever take from ASCAP the index they offered [fol. 691] to give you?

A. I didn't know they ever offered an index.

Q. Did you ever receive a letter from them?

A. Not to my knowledge.

Q. You employ arrangers in your establishment?

A. One acts as an arranger.

Q. You employ him permanently there?

A. In the orchestra we employ.

Q. There is always an arranger on your premises, isn't there?

A. I suppose there is someone in the orchestra who can make certain arrangements.

Q. Now, could you take any compositions of the public domain and have them arranged for use over the radio?

A. I suppose we could.

Q. It would involve the expenditure of some money, wouldn't it?

A. It certainly would involve the expenditure of some money.

Q. You play transcription records over your radio?

A. We do.

Q. How many hours a day would you say?

A. Which radio station are you talking about?

Q. Let's take KFAB.

A. Well, I would say on KFAB we probably play a half to three-quarters of an hour a day.

Q. As against how many other hours?

A. Well, it varies on KFAB—I would say it averaged about eighteen or eighteen and a half hours a day.

[fol. 692] Q. About the same time on KFOR?

A. A little more than that.

Q. KOIL?

A. We would probably play a little more than on KFAB.

Q. Do you obtain those transcription records outside of the State of Nebraska?

A. Yes.

Q. They are sent in to you by mail or express?

A. That is right.

Mr. Frohlich: That is all.

Redirect examination.

By Mr. Hotz:

Q. Mr. Searle, was the National Broadcasting Company authorized to negotiate for and on behalf of your companies with reference to ASCAP at all?

A. You don't mean the National Broadcasting Company?

Q. I mean the association.

A. The National Association of Broadcasters had a committee appointed to find out what sort of an arrangement

they could get from ASCAP. The general understanding was, of course, they would report to the members anything that they might be able to recommend or anything they might be able to get, and put it up to each individual station to accept or reject according to their own desires.

Mr. Hotz: That is all.

Witness excused.

[fol. 693]

OFFERS IN EVIDENCE

Mr. Hotz: Offer in evidence defendants' Exhibit Number 55 as part of our direct examination of Mr. Gillin, being telegrams passing between WOW and the American Society of Composers, Authors and Publishers, and which were referred to a number of times by Mr. Mills and Mr. Gillin.

Mr. Frohlich: Give the dates of those telegrams.

Mr. Hotz: December 30, 1935, signed by the American Society, addressed to WOW (reading); another one dated January 10, 1936 (reading); answered by radio station WOW (reading).

We offer in evidence a certificate signed by Mr. Hoyt, Clerk of the United States District Court, showing the number of cases and the disposition of them by the complainant American Society on the dockets of the Grand Island Division, and a similar one from the Lincoln Division, and a similar one from the Norfolk Division, and similar ones from the Omaha Division, duly certified as of the 6th day of August, 1937, by Mr. R. C. Hoyt, by his deputy, with the seal of the Court attached.

Mr. Frohlich: I have prepared here, your Honors, a document which is more complete than this one, because [fol. 694] I have gone back to 1925, and I have every single suit brought in the State of Nebraska by ASCAP. It includes the information in Mr. Hotz' document, but has additional information about what happened in each instance.

The Court: Is it certified?

Mr. Frohlich: It is my own document and we prepared it. I don't question his exhibit, but I am willing to consent to it if we can have all the facts before the Court.

The Court: You want to object?

Mr. Frohlich: I will have to make a technical objection unless we can put in my document.

Mr. Hotz: The only objection would be I don't want to further encumber the record.

Mr. Frohlich: I don't want to put Mr. Blazer on the stand.

Mr. Hotz: This document which I have is certified by the Court and shows the title of the case and the case number, the date filed and the disposition, and the case dismissed by order of the Court, and whatever other final entry was made in those cases, duly certified by the Clerk, and that is all I am interested in.

Mr. Frohlich: It doesn't tell the whole story.

The Court: He states his record shows what happened [fol. 695] in each of the cases.

Mr. Frohlich: Up to the point it left this court room. Mine shows what happened after it left this Court. Just to put in a list of suits that show judgments running in substantial amounts would make it appear as if the Society were bringing suits for the purpose of securing substantial damages, and which is not a fact, and I can prove it here by Mr. Blazer or by this list, which shows, in spite of the judgments, we settled for the actual costs of the suit, and we didn't go out and collect three or four hundred dollars from these poor devils, and we never did it. I think this will save time, but mine is an accurate list.

Mr. Hotz: I don't know anything about what happened after the case left the Court.

I will offer in evidence defendants' Exhibit Number 56.

Mr. Frohlich: May I object to it, your Honor?

The Court: Overruled.

Mr. Hotz: I believe that there was a counter showing made and filed with the Clerk by the defendants in this case under date of August 14, 1937, and that was a counter [fol. 696] showing made at the time of the application for the temporary injunction, and I am not so sure from the standpoint of procedure of two things: One, whether or not already being on file whether it would be a part of the record in the main case or not, or whether it has to be re-introduced or whether I am entitled to have it. My opinion is that it is part of the record in this case, and it is proper, and that I have a right to use it for whatever use we may desire to make of it, of re-introducing at this time the counter showing made on the temporary injunction.

The Court: Unless you stipulate to try the case on the merits by affidavit that it is a part of the record for the trial of this case on the merits. That was addressed to the temporary injunction.

Mr. Frohlich: I object, your Honors, to the introduction of any such affidavits on the ground that they are hearsay statements of people who were not subject to cross-examination, and not properly a trial on the merits.

The Court: Objection sustained.

Mr. Hotz: I will offer in evidence defendants' Exhibit number 57 which is the counter showing of the defendants [fol. 697] filed in this Court on August 14, 1937 in the hearing on the temporary injunction, offered by the defendants as part of their defense in this case.

Mr. Frohlich: I object to the introduction of the document on the ground of hearsay statements, the statements of people who are not brought into court and subjected to cross examination, and as self-serving, and they are not part of the hearing upon the merits.

The Court: Objection sustained.

Mr. Frohlich: Would you be willing to state into the record that the American Society of Composers, Authors and Publishers have never filed their articles of association, that is, the articles of association that are here before this Court, with the Secretary of State or any other officer in the State of Nebraska at any time.

Mr. Hotz: I object to that as it is wholly irrelevant, immaterial and incompetent, and has no bearing on the issues here.

Mr. Frohlich: He stated he would be willing to waive proof through the Secretary of State's office, and so forth, but I think it is material, and that they never filed anything with the Secretary of the State or any other official.

Mr. Hotz: It is incompetent, irrelevant and immaterial. [fol. 698] The Court: It is not a question whether it is pertinent or not, but it is a question whether you require them to produce primary proof of that fact, or whether you want to waive that and state you haven't it.

Mr. Hotz: I will state for the record I haven't, but I also urge that the question whether I have or haven't is not competent or relevant to this record.

The Court: It is in the record.

Mr. Hotz: Defendants offer in evidence defendants' Ex-

hibit Number 58, which is the interrogatories and the answers and objections to the answers, and the exhibits, of Walter S. Fischer, president of Carl Fischer, Inc.

Mr. Frohlich: There is no objection to that, with the understanding your Honors will make a ruling.

The Court: It will be received subject to the objection.

Mr. Hotz: Defendants offer in evidence defendants' Exhibit Number 59, which is the interrogatories and answers, and objections and exhibits of Saul Bornstein, treasurer.

Mr. Frohlich: There is no objection.

[fol. 699] Mr. Hotz: Offer in evidence defendants' Exhibit Number 60, which is the interrogatories and answers, and objections and exhibits, of Gene Buck.

Mr. Frohlich: There is no objection.

The Court: It may be received.

Mr. Hotz: Offer in evidence defendants' Exhibit Number 61, which is the interrogatories, answers, objections and exhibits of Gustave Schirmer, secretary of Schirmer, Inc.

Mr. Frohlich: There is no objection.

The Court: It may be received.

Mr. Hotz: The defendants rest.

[fol. 700] EUGENE N. BLAZER, was called as a witness in rebuttal on behalf of the complainants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. What is your full name?

A. Eugene N. Blazer.

Q. Where do you reside?

A. Omaha.

Q. Are you a member of the bar of the State of Nebraska?

A. I am.

Q. And have been for many years?

A. Twenty-five.

Q. And admitted to all the Courts in this state?

A. Yes, sir.

Q. And for upwards of twenty-five years have you represented the American Society in the seeking out of infringe-

ment and making contracts for the public performance for rights in the State of Nebraska?

A. I believe since 1920.

Q. And in that capacity have you brought suits for infringement against those persons in the State of Nebraska who publicly perform for profit the works of the members of the Society?

A. Yes, sir.

[fol. 701] Q. Now, I show you this schedule and ask you whether you at my request prepared this schedule of the suits brought in this state since 1925?

A. Yes, sir.

Q. Does that schedule truly and accurately represent, so far as you have been able to ascertain, the title of each suit brought by you in this state?

A. Yes, sir.

Q. In the Federal Courts, of course?

A. Yes, sir.

Q. Does it also truly and accurately represent the final disposition that was made in every instance of every suit brought in this state?

A. I believe so, according to my records; this was taken from my records.

Q. And in the usual course of business in your office?

A. Yes, sir.

Mr. Frohlich: I offer in evidence plaintiffs' Exhibit Number 62.

Mr. Hotz: May I ask the witness if it takes note of the disposition that was made between yourself and the defendants in those respective cases?

The Witness: Yes, Mr. Hotz, you will note at the end under the heading of "Remarks" it shows it.

[fol. 702] Mr. Hotz: Well, I have no objection to that. I might use that some place along the line.

Mr. Frohlich: That is all.

Cross-examination.

By Mr. Hotz:

Q. You work for ASCAP aside from handling infringement cases, you represent the Society in the collection of the license fees for the public performance rights of the Society in the State of Nebraska, is that right?

A. That is true, with the exception of radio broadcasting.

Q. And they go directly into New York for that?

A. Yes, sir, they go directly into New York.

Q. And do you maintain an office in the City of Omaha?

A. As a lawyer, I do.

Q. But you don't have any office that is designated ASCAP?

A. I don't think there is any designation on my door.

Q. But there is on the letters you send out; when you write letters, you write them out on stationery of the American Society of Composers, Authors and Publishers, signed by yourself as Eugene Blazer? How do you usually sign?

A. Counsel.

Q. You do have such stationery and that is the stationery you use ordinarily?

A. That is right.

Q. Throughout the state?

[fol. 703] A. That is right.

Q. Do you maintain an office force, that is, some people as your assistants to aid and help you in this work in the State of Nebraska?

A. One.

Q. Who is that?

A. Mr. Gibbs.

Q. And part of your duty is, if you have a controversy, for example, with a dance hall or user of music out in the state, either you or Mr. Gibbs go out and discuss the matter of their license fee, and make an arrangement, if you can, and enter into a contract and collect that fee, is that right?

A. Well, we attempt to contact him. If we think he is not using our copyrighted music, we don't want him; assuming that he is using our music, or expects to, yes.

Q. You go out in the state and talk with him about it?

A. I don't go out very often. Mr. Gibbs usually goes.

Q. You used to when you were young, is that right?

A. True.

Q. And you carry on your negotiations in the establishment of that individual wherever it happens to be, and make a deal if you can, and he signs the contract, and that is all there is to it, except fulfillment of the contract, except payment?

A. It is too broad and general a question, but I will answer it. We attempt to negotiate the license if we have

[fol. 704] reason to believe that the gentleman to whom we are addressing ourselves is using or expects to use copyrighted works of our members, and according generally to a schedule of rates of the Society, and we negotiate in those cases, except some rare instances such as leading hotels.

Q. The group of exhibits here, Exhibit Number 16, contain 391 copies, and all, or substantially all, contain your signature, do they not?

A. Without examination, I would say the vast majority do—"American Society of Composers, Authors and Publishers, by Eugene N. Blazer."

Q. As agent and attorney in fact?

A. That is right.

Q. And you are authorized, I presume, by the Society to so sign?

A. I don't remember exactly when the authority was given, but I have been doing it.

Q. They have been recognizing it?

A. They have been recognizing it.

Q. Is the American Society contributing in any way to your office expense?

The Court: That doesn't seem to be cross examination. He has been asked very few questions with reference to these particular cases.

Mr. Hotz: That is all.

Mr. Frohlich: That is all.

Witness excused.

[fol. 705] Mr. Frohlich: The complainants rest.

Mr. Hotz: The defendants rest.

The Court: There is certain data you were calling for from the witness Gillin.

Mr. Hotz: There is to be read into the record the number of radios shown by the records of WOW, that is, privately used sets in the State of Nebraska.

Mr. Frohlich: And also the SESAC contract.

Mr. Hotz: And we ask leave to substitute the photostatic copy of the SESAC contract.

Mr. Frohlich: No objection.

(Whereupon an adjournment was taken until 9:30 o'clock A. M., Thursday, September 21, 1939.)

[fol. 706] (At 9:30 o'clock A. M., Thursday, September 21, 1939, Court convened pursuant to adjournment, all parties present as heretofore, and the following proceedings were had, done and entered of record, to-wit:)

Mr. Frohlich: Your Honors, before proceeding with the argument, Mr. Gillin, one of the witnesses on the stand yesterday, sent me a photostatic copy of the SESAC contract, which I would like to offer in evidence as plaintiffs' Exhibit Number 64.

Mr. Hotz: Also WOW has furnished the number of radios in the State of Nebraska in the homes, exclusive of radios in automobiles.

The Court: By consent of the parties, both exhibits will be received.

[fol. 707] IN UNITED DISTRICT COURT, DISTRICT OF NEBRASKA,
LINCOLN DIVISION

[Title omitted]

DEPOSITIONS FOR PLAINTIFFS

[fol. 708] Testimony of Witnesses, pursuant to a notice dated December 13, 1937, and all subsequent stipulations thereto, held at the offices of Messrs. Schwartz & Fröhlich, No. 1450 Broadway, Borough of Manhattan, City of New York, New York, beginning on May 23, 1938, at 11 o'clock a. m.

APPEARANCES:

For the Plaintiffs: Messrs. Schwartz & Frohlich, by Louis D. Frohlich, Esq., Herman Finkelstein, Esq., and Jack M. Nitzburg, Esq., of counsel.

[fol. 709] For the Defendants: Barley C. Nye, Esq., Attorney General of the State of Nebraska; William J. Hotz, Esq., and Andrew C. Bennett, Esq., of counsel.

STIPULATION RE DEPOSITIONS

It Is Stipulated that the witnesses whose depositions will be taken herein need not return to sign any oath affirming the truth or falsity of the statements contains in said depositions;

It Is Further Stipulated that the defendants do severally object to the materiality of each and all of the questions asked any witnesses in these depositions by the plaintiffs and as to the materiality of each and all of the exhibits offered by the plaintiffs; and it is further stipulated that the plaintiffs object to the materiality of each and every question asked by the defendants on cross-examination of each and all of the witnesses whose testimony is taken in these depositions;

It Is Further Stipulated that the objections made by the defendants to each and all of the depositions shall be deemed to be an objection made for and on behalf of each of the [fol. 710] defendants separately, the same as though separately stated by counsel for each of them; and it is further stipulated that the objections made by the plaintiffs to each and all of the depositions shall be deemed to be an objection made for and on behalf of each of the plaintiffs separately, the same as though separately stated by counsel for each of them;

It is further stipulated that the plaintiffs will produce Mr. John G. Paine, Mr. E. Claude Mills and Mr. Gene Buck upon the trial of this case in Nebraska, who will bring with them and have available all of the relevant and appropriate records of the American Society of Composers, Authors and Publishers for use on the trial.

It is further stipulated that the taking of the depositions in Los Angeles, California, fixed by previous notice and stipulations for June 6, 1938, be continued until June 15, 1938, at the same place at the hour of ten o'clock a. m., and that the date of filing of said depositions be extended ten days accordingly.

[fol. 711] DEPOSITION OF SIGMUND SPAETH

[fol. 712] SIGMUND SPAETH, called as a witness on behalf of the plaintiffs, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. Doctor Spaeth, what is your full name and address:

A. Sigmund Spaeth; business address, 220 West 42nd Street, New York; home address, Westport, Connecticut.

Q. What is your occupation?

A. I have the title of "tune detective" on the radio. In a way, that describes my activities. I have used the researches, studies and analyses of music that I have made all my life for entertainment through broadcasts, through lectures, through other forms of educational entertainment, through motion pictures. I have written over a dozen books popularizing music. I have written a number of magazine articles. I have taught music, especially in the University of Hawaii, Honolulu. In fact, my activities all having to do with music, the analysis of music, the popularization of music, and to a certain extent I have composed music and written words for music.

Q. Can you give us the names of the books you have written?

A. Well, the best known book is perhaps "The Art of [fol. 713] Enjoying Music." That is used as a text book in over fifty schools and colleges. My book, "Behind the World's Best Music," that is used by commentators on the radio. I have written, "Great Symphonies, How to Remember and Recognize Them," in which I set words to the best symphonies. I also wrote a book called "The Common Sense of Music," which was the first attempt to make music intelligible to the layman.

Q. When was that written?

A. 1924.

Q. Are you a member of the American Society of Composers, Authors and Publishers?

A. Yes.

Q. When did you become a member of that Society, about?

A. So far as I remember the date, it was about 1922; it was before 1930. I haven't my contract; they would have a record of the exact date. I would say 1922 or earlier.

Q. Had you prior to your joining the Society written musical compositions or words of musical compositions?

A. Yes, I had done that sort of thing during almost my entire life, certainly since I am in New York, which is 1912, and before that in college, and while teaching at Princeton University; I have always been fairly active in the creation, arrangement and adaptation of music of all sorts.

[fol. 714] Q. Can you give us the names of some of the pieces you have written?

A. Yes. My membership in ASCAP is based chiefly on my lyrics. As a writer of words I have written words of the song, "Down South", which has been very popular and had, I believe, a number of performances on the air. It was recorded in 1906. I wrote the words for a song by Franz Lehar called "My Little Nest;" the full name is "My Little Nest of Heavenly Blue." That was performed on the air.

I wrote the words for a song called "Chansonette," with music by Rudolf Friml. That song had considerable popularity and appeared recently as "The Donkey's Serenade," although my lyrics do not appear there.

There was a song called "The Madrigal of May," a song used by John Barrymore in his production of "The Jest", for which I wrote the words.

I have written various other lyrics, and among my compositions is a setting of humorous poems, "Jabberwocky," a nonsense poem, which I set to music, published by Shirmer. I have published several other choral numbers, chiefly for male voices.

Q. Had you written any of those pieces you have just mentioner, prior to 1914, or prior to 1922 when you joined the Society?

[fol. 715] A. None of those which I have just mentioned, no, but I had written—yes, some of them had been published before I joined the Society. I had written the lyrics which I spoke of, they had been written before the time. I had written various college songs, some of which have since been published. One song appears now in the Haverford College Song Book, called "Haverford Harmony." I used a similar tune in a "Song of Kiwanis". I was National Chairman of Music for two years. That is an organization similar to Rotary. I was editor of the Kiwanis Song Book.

Q. Are you a citizen of the United States?

A. Yes, by birth.

Q. By birth?

A. Yes, born in Philadelphia, Pennsylvania.

Q. Prior to the time that you became a member of the Society, had you ever received any compensation for the performance rights in any of the works that you had written or composed?

A. No, none whatever.

Q. When for the first time did you receive any compensation for your performance rights?

A. At the end of the first year, or at the end of the first quarter I got the membership in ASCAP.

Q. So far as you remember that was about 1922?

[fol. 716] A. Yes. It might have been a year earlier. It was shortly after I joined the staff of the American Piano Company, which was in 1920, because I know that one of the songs which made my membership possible was "Chansonette".

Q. Prior to the time you joined the Society had you ever made any effort to ascertain whether any of the works written by you had been publicly performed for profit?

A. I had no way of checking up. I simply assumed that it would be a hopeless task, and I never made any definite effort to get any return from those works. Of course, the works that were published finally—when I say finally, I mean works of the more commercial type than the ones I had written at college—when those were published, I received royalties on sheet music; but I received no returns until I joined ASCAP.

Q. Did you receive royalties on mechanical reproductions of your compositions?

A. Yes.

Q. From whom did you receive those?

A. Mostly from the firm of E. B. Marks Music Company. They published most of my works. Some came from Shirmer and some from Boston Music Company.

Q. Have the copyrights on any of your works been renewed?

[fol. 717] A. No; they were most of them written within twenty years.

Q. When these works come up for renewal will they be renewed by you in your name, if you are alive?

A. I presume so.

Q. Have these works a value for renewal purposes?

A. Yes.

Q. Are you in a position to demand advance royalties for the renewal of your works at that time?

A. That depends on the value of those works in the eyes of their publishers. I would be inclined to try to get an advance royalty if I could.

Q. Taking all the works you have written and composed over the years; assuming they are to be renewed some day after the 28 years original copyright had expired, would

you say that these renewals have a substantial value to you?

A. Yes.

Q. Can you state for the record what you think they are worth?

A. That is hard to say. Two or three of the songs for which I wrote the words have had a very heavy sale. They have become standard. Take "Down South", it was the theme song of the "Show Boat". It is constantly on the air. It is very popular. I think that song will be very [fol. 718] popular because the tune goes back to 1890. I was asked to write a modern lyric around 1920 to bring it back to popularity; and that occurred, because that song was very popular; therefore I have drawn sheet music royalties on that lyric and I expect that copyright to be renewed and to continue to draw on it.

Similarly, the song of Franz Lehar, a great composer; that song has great value. It was played as a violin solo by Kreisler. Those two numbers have a great value. In addition to which I have several collections of old songs, the best one of which is "Read 'Em and Weep," "The Songs You Forgot to Remember." Those collections are used as text books, and they have been used as material on the radio. Many of those songs are available only in my books.

I expect to keep those copyrights under my control permanently.

Q. What would you say was the value of a song like "Chansonette", to you?

A. That is not a good example, because "Chansonette" as a song has practically ended its life through being turned into "Donkey's Serenade". I only wrote the words. I have no interest in the present words, although the motion picture company paid me something for the right to use the [fol. 719] song. Therefore, eliminate that lyric. But "Down South" had a very definite value.

Q. What value would you say it had for renewal?

A. If I were asking for an advance of royalty on that I would ask for perhaps \$500. It is pretty hard to judge those things.

Q. What would you expect to take in by way of royalty during the additional twenty-eight year period of that renewal?

A. That would be very difficult to say. The actual sheet

music royalties, records and mechanical reproductions on a song don't approach the real value of the performing rights. The performing rights of a song like that are very much more valuable to me.

Q. What would you say would be the value to you for the renewal period?

A. It would be very difficult for me to say.

Q. Can you give me some estimate?

A. I would say perhaps two thousand dollars, maybe more.

Q. What would be the value of the Franz Lehar work?

A. I would say the same.

Q. "The Madrigal of May," what would be the value of that for the renewal period, for performing rights and everything else?

[fol. 720] A. That would be perhaps somewhat less, because it has never been performed.

Q. What would be the value of the "Jabberwocky"?

A. That would be impossible to estimate. It is a setting for male chorus. Its performing rights and other rights would be perhaps as much as the other. I am not inclined to be overoptimistic of these things. I am judging from the returns I have had in the past. I am not, of course, a song writer in the sense that Irving Berlin is, but I have had my returns. My returns through ASCAP have always been in excess of my returns from publishing.

Q. When you wrote your songs as a rule you entered into a contract with publishers?

A. Yes.

Q. Under that contract does the publisher agree to pay you royalties?

A. Yes.

Q. On the sale of the sheet music?

A. Yes.

Q. And on mechanical reproductions?

A. Yes.

Q. There are provisions in your contract for performing rights, are there?

A. None whatever.

[fol. 721] Q. Now, did ever any user of that music, any hotel or restaurant or any night club or motion picture company or any motion picture exhibitor or any radio station, apply to you for the right to have a license to publicly per-

form for profit any of the musical compositions that you published prior to your joining up with the Society?

A. No. I think that my works were used fairly often without any permission; but radio was in its very early days then so radio wouldn't have been interested.

Q. Have you a wide knowledge of the music profession?

A. Yes.

Q. Are you familiar with the people in it?

A. Yes.

Q. You know something of the customs and usages of the business?

A. Yes.

Mr. Nye: What are we going to do about objections? I want the record to show that the parties stipulate that either side may make such objections to the testimony as they wish at the time it is read in evidence.

(Discussion off the record.)

Mr. Nye: I want to object as to the materiality of all of the questions and also object to all questions and answers [fol. 722] pertaining to the value of renewal of copyrights as highly speculative, for the reason there is no foundation for the opinion of the witness on this point.

Q. Now, Dr. Spaeth, can you tell us what you received by way of royalties from the American Society of Composers, Authors and Publishers for each year that you were a member of that Society since 1922?

A. My first classification, which I assume was a rather low one, paid me annually royalties of \$80, and I paid \$10 a year out of that, so that my net return for a good many years, for more years than I want to think back on, but it was several years before I got out of that \$80 class. That has gradually been raised, and then I received the princely sum of \$400 a year.

Q. What did you get by way of royalties per year from "Chansonette," from the sale of sheet music?

A. Those royalties were never very large; I can't tell the exact amount, but comparatively small amounts.

Q. What would you call a comparatively small amount?

A. Perhaps from twenty to forty dollars a year.

Q. What did you get from "The Madrigal of May"?

A. Even less.

Q. "Jabberwocky"?

[fol. 723] A. Less than fifteen dollars a year from both those.

Q. What did you get from your collection of choral works?

A. Those chorals, they have all run about the same thing. My sheet music royalties, the aggregate has never been very large. The entire total would represent perhaps a few hundred dollars a year, say; certainly not enough to live on. My best return was from "Down South".

Q. What did you get from that?

A. Pretty close to a hundred dollars a year.

Q. For how many years?

A. Ever since about 1920.

Q. What would be the total of your royalties from sheet music each year?

A. I don't think that any year I have drawn sheet music royalties of over \$300, or perhaps \$400 a year.

Q. Would that be an average?

A. The average would be no more than \$300, perhaps \$250.

Q. What would you say would be an average? Strike an average if you can.

A. \$250 a year.

Q. Do you get anything for mechanical rights on any of your compositions?

A. I included my mechanical rights in that. My royal-[fol. 724] ties statements from my publishers since 1920 have not averaged more than \$250 a year, including mechanicals. My share of the mechanicals is 33 and one-third per cent.

Q. Did you get as much as \$250 each year for the period that you have been publishing music?

A. No. My most recent royalty statement, which is the one which is freshest in my memory, was a little more than \$50; that was from Marks; Marks has most of my publications; I have very little from anybody except Marks; so that by this last statement of fifty some odd dollars I feel that \$250 average during the year is fairly liberal. There have been years where it ran more than that, \$300 to \$400.

Q. Has there been any diminution of the returns to the writers from the sales of sheet music, if you know?

Mr. Nye: I object to that; no foundation for the witness's knowledge.

A. I would speak from my own experience, so far as I am concerned.

Q. That is not an answer. Are you acquainted with song writers?

A. Yes, with a good many of them.

Q. Do you also know publishers?

A. Yes.

[fol. 725] Q. Do you know Irving Berlin, Inc.?

A. Yes.

Q. Do you know the members of Carl Fischer, Inc.?

A. Yes.

Q. And G. Schirmer, Inc.?

A. Yes.

Q. E. B. Marks?

A. Yes.

Q. Harms?

A. Yes.

Q. Do you know any other publishers?

A. Yes, I know J. Fischer & Brother; the Boston Music Company; Shapiro, Bernstein & Co.; Feist; Robbins; I know executives and others in all of those firms.

Q. Do you know of your own knowledge whether there has been a diminution of royalties received by these publishers from the sale of sheet music since 1922?

Mr. Nye: I object to that as calling for a conclusion.

A. Yes, I do know. I do know that there has been a steady and very definite diminution.

Mr. Nye: I object to the answer, except the word "Yes," as not responsive.

Q. Do you know what that has been due to?

[fol. 726] Mr. Nye: I object to it for the reason it is immaterial, and also no foundation.

A. Yes.

Q. What has it been due to?

Mr. Nye: I object to it as speculative, no foundation.

A. It has been due to the gradual encroachment, first the phonograph and later the radio, which interfere very strongly with the sale of sheet music, by taking the place of sheet music in the home.

Q. Has that diminution been very substantial?

Mr. Nye: That is objected to as calling for a conclusion, speculative, no foundation.

A. Yes.

Q. Have you seen any diminution in the royalties that you received from your own compositions in the past sixteen years?

A. Yes.

Q. Has that diminution been marked, substantial?

A. Yes.

Mr. Nye: Give me an objection as to the materiality on all of that.

Q. Which of your songs in the last two or three years has been played on the radio to any extent?

[fol. 727] A. "Down South."

Q. When was that played on the radio?

A. I couldn't give the last time, but I was told I received—

Mr. Nye: I object to that as not responsive.

Q. Finish your answer.

A. When I say I was told, I received a written record from my publisher of the figures for 1936, which is the last year on which complete figures are available, and the complete figures—

Mr. Nye: I object to that as not responsive and not the best evidence.

Mr. Frohlich: Let him finish his answer.

Mr. Nye: I withdraw that.

A. (continued) The figures given me by my publisher on "Down South" show it has been played on the air over five thousand times during 1936.

Q. How many copies of the sheet music were sold during 1936 of that song?

Mr. Nye: I object to that as immaterial.

A. I couldn't give you the exact figures; certainly not more than two thousand.

Mr. Nye: You mean two thousand pieces?

The Witness: Two thousand copies of sheet music, certainly not more, and probably less.

Mr. Nye: The one piece, "Down South," you are talking about?

The Witness: Yes.

Q. Did you find that the figures of performing over the radio had any effect at all upon the sale of sheet music of your composition?

Mr. Nye: Objected to as speculative, no foundation having been laid.

A. Yes; the figures prove it quite definitely.

Mr. Nye: I move to strike out the answer as a conclusion and not a statement of fact.

Q. Is the sale of sheet music stimulated or retarded by the broadcasting of the composition?

Mr. Nye: Same objection.

A. Definitely retarded.

Q. You said the figures have proved that. Have you some figures?

Mr. Nye: Objected to as immaterial.

A. My royalty statements have consistently shown a smaller sale of sheet music as compared with a larger distribution through radio. The biggest year in radio, 1936, was my smallest in sheet music royalties up to that time. It has been still smaller since that time.

[fol. 729] Q. Now suppose, Doctor, that you were acting alone and independently of a substantial number of other composers or writers, would you be able to determine and fix the price to be charged for the use or rendition of your copyrighted musical compositions within the State of Nebraska?

Mr. Nye: I object to that as calling for the conclusion of the witness, no proper foundation laid, and speculative.

A. I would have no way of judging or fixing such price.

Q. If you were to fix the price of a composition for the public performance for profit, what would you have to take into consideration, in the State of Nebraska?

Mr. Nye: Objected to as calling for the conclusion of the witness, not the proper form of hypothetical question; no foundation.

A. I would be guided by the possible interference with my local sales of sheet music and mechanicals.

Q. What would you have to take into consideration, to fix the price for public performance for profit?

Mr. Nye: Same objection.

A. If I had to fix such a price I would be inclined to price it in accordance with the profit that I thought the user was making and I would try to charge him just as [fol. 730] much as I could reasonably in accordance with his business.

Q. Would you have to take into consideration the nature of the use?

Mr. Nye: Same objection to all these questions.

A. Yes.

Q. Would you have to take into consideration the establishment at which the composition would be performed?

A. Yes.

Q. Would you have to take into consideration the size of the orchestra or the nature of the artist or singer who performed the composition?

A. Yes.

Q. Would you have to take into consideration the size of the establishment and the business that it does?

A. Yes.

Mr. Nye: I also object to all these questions as extremely leading.

Q. Tell me all of the factors that you would take into consideration if you were to fix and determine the price to be charged for the public performance for profit of one of your compositions?

A. I would take into consideration the profit likely to be made by the user, the size and importance of the establishment [fol. 731] concerned, the elaborateness or complicity of the production, the size of the potential audience, and lastly, the possible effect upon my own returns in other ways from that same territory.

Q. Would you have to do that, Doctor, with respect to each and every place in the State of Nebraska, which would use your composition for public performance for profit?

A. Yes.

Q. Are you in a position financially to make investigations in the State of Nebraska with respect to the establishments of the various users of music in that State?

A. No.

Q. Are you able to employ investigators within the State of Nebraska for the purpose of eliciting that information?

Mr. Nye: Objected to as immaterial and calling for the conclusion of the witness.

A. No.

Q. Are you in a position financially or otherwise to employ investigators for the purpose of detecting infringements of your compositions within the State of Nebraska?

Mr. Nye: Same objection.

A. No.

[fol. 732] Q. Are you in a position financially or otherwise to engage lawyers to bring suits to protect you against infringements in the State of Nebraska?

Mr. Nye: Same objection.

A. No.

Q. Have you ever been in the State of Nebraska?

A. Yes.

Q. Have you ever heard any of your compositions played in the State of Nebraska?

A. I have played them myself.

Q. Have you heard others play them?

A. No, I can't say that I have, but I have numerous times played my compositions at the Ad-Sell Club in Omaha. I appeared at a night club there where they were doing one of my songs.

Q. Would you be able to fix a price to be charged for the public performance for profit, at the time your compositions are published?

Mr. Nye: Objected to as immaterial and speculative.

A. It would be impossible to fix it in general; it would have to be specially fixed for each performance.

Q. So that if you publish a composition, at the time the composition is published and sold in the State of Nebraska, [fol. 733] would you have any way at that time to put on that composition the price to be charged for the public per-

formance for profit of that composition in the State of Nebraska?

A. No, I couldn't put such price on it.

Q. When you publish a piece, who does the publishing and selling, you or the publisher?

A. The publisher.

Q. Have you given any of your publishers at any time on any of the compositions that you have published, the right to fix a price for the public performance for profit of your compositions within the State of Nebraska?

Mr. Nye: I object to that as not the best evidence.

A. The answer is no.

Mr. Nye: Add to that an objection as to materiality.

Q. Have you ever received any royalties from any of your publishers on any of your compositions, for the public performance for profit of any of your compositions?

Mr. Nye: I object to that as immaterial.

A. I don't remember receiving any. The only royalties which would come under the head of mechanical. That is off the record.

[fol. 734] Q. Do you wish to retain to yourself the right of public performance for profit in any of your musical compositions at the time that they will be renewed, when the original term of copyright expires?

Mr. Nye: That is objected to as immaterial, calling for a conclusion of the witness, and speculation.

A. I always expect to control the performing rights to my compositions either personally or through such an organization as ASCAP.

Q. Would you allow your publisher to fix the price for public performance for profit on any of your renewal copyrights?

Mr. Nye: Objected to as calling for a conclusion and speculative.

A. I would not allow that.

Q. Would it be to your advantage to control the price for the public performance for profit of any of your musical compositions at a future date?

Mr. Nye: I object to that as calling for a conclusion, speculation, and immaterial.

Q. Apart from the sale of sheet music?

Mr. Nye: Same objection.

A. Would it be to my advantage to control the price for [fol. 735] public performance for profit?

Q. Yes.

A. It would be, but I can't conceive such a possibility.

Q. Supposing such a possibility and there were no Society and you were acting as an individual, would it be to your advantage to control in the future, apart from the sale of sheet music, the public performance for profit of your respective compositions?

Mr. Nye: Same objection, and also it is in improper form for a hypothetical question.

A. My answer would be, it would be profitable if possible, but I can't conceive of the possibility.

Mr. Nye: I move to strike out the answer, except the words, "It would be profitable," as not responsive.

Q. Assuming that there were no Society, assuming that you were acting as an individual author, would it be to your advantage if you published your compositions to retain to yourself the right to public performance for profit and to fix a price for that right at a future date?

Mr. Nye: Same objection as to the last question.

A. I would be compelled to fix such a price if I had no other means of protection.

[fol. 736] Mr. Nye: I move to strike out the answer as not responsive.

Q. Will you explain your answer, "It would be profitable if it were possible"?

Mr. Nye: Same objection to that question as to the other two.

A. I mean by that that I cannot conceive of the possibility of carrying out the necessary details and machinery for protecting all or even a substantial part of the public performances of my copyrighted works anywhere.

Mr. Nye: I move to strike out the answer as not responsive, speculative.

Q. Why would it not be possible?

A. Because it has been my experience that no one will ever pay for such a thing as a copyrighted piece of creative art unless the person is forced to do so.

Mr. Nye: Note my objection to the last question as calling for a conclusion and immaterial. I move to strike out the answer for the reason that it is argumentative and not a statement of fact.

Q. Is this your last contract with the Society, Doctor, dated June 28, 1935 (handing paper to the witness)?

A. That is right.

[fol. 737] Q. Is that your signature and the signature of Joe Young, Secretary?

A. That is right.

Mr. Frohlich: I offer it in evidence.

Mr. Nye: I object to it as immaterial.

(The document just offered was received in evidence and marked Plaintiffs' Exhibit No. 1, of this date.)

Q. Assuming that there are 367 users of copyrighted musical compositions in the State of Nebraska, what would you have to do to protect your performing rights in that State, if you were acting alone?

Mr. Nye: I object to that as calling for speculation; no foundation.

A. I would have to check every possible performance of my work by keeping track of all the activities of all of those users, by engaging clerical assistants in the State of Nebraska, or in some such way keeping check.

Q. Would that involve the outlay of money?

A. It would involve the outlay of so much money that I couldn't start to do it.

Mr. Nye: Objected to as immaterial.

Q. How much money do you estimate that would require?

Mr. Nye: Objected to, no proper foundation laid, speculative. [fol. 738]

A. To be done properly it would require the engagement of a clerical assistant at a salary of from two to five thousand dollars a year, plus incidental expenses.

Q. How about a lawyer?

Mr. Nye: Same objection to that question.

A. The necessity of legal services would greatly add to the expense.

Q. How much would you say it would cost?

A. If I retained a lawyer to protect me in the State of Nebraska in addition to retaining a clerical representative in the State, I imagine my total bill per year would run certainly well over \$5,000, somewhere between five and ten thousand dollars a year.

Mr. Nye: I move to strike out the answer to both the last questions, as speculative, and not statements of fact.

Q. Are you financially able to make that expenditure?

A. By no means.

Q. Would you be required, if you were acting alone, to have investigators go round from place to place in Nebraska to look out for the performance of your compositions?

Mr. Nye: Objected to as calling for a conclusion.

[fol. 739] A. Yes.

Q. Would these investigators have to go round to practically all the 367 users in Nebraska?

Mr. Nye: Same objection.

A. Yes.

Q. Would they have to go round there frequently?

Mr. Nye: Same objection.

A. Yes.

Q. Have you taken that into consideration in estimating the cost?

A. Probably not.

Q. How much do you think it would cost to make a proper investigation to detect infringement of your compositions in the State of Nebraska and to protect them by infringement suit?

Mr. Nye: Same objection.

A. It would be difficult to estimate the cost of any such action, and such action could hardly be initiated unless I had some representative, some prior representation there. The action would undoubtedly increase the expense and undoubtedly make for a larger return. I would consider that expense in addition to a lawyer to protect my interest, I would consider that in this State an expense which could not now be estimated, depending on the amount of time [fol. 740] spent in the matter and the amount of work required by the report of my local counsel.

Mr. Nye: I move to strike out all the answers as to the speculation of this witness as to the cost of doing business in the State of Nebraska, for the reason that they are not within any knowledge that the witness has.

Q. Are you familiar with the problems of an infringement suit, Doctor Spaeth?

A. Yes.

Q. Have you frequently testified as an expert in infringement suits?

A. Yes.

Q. Have you testified for me?

A. Yes.

Q. Do you know something of the defenses that are put in in those suits?

A. Yes.

Q. Are you familiar with the requisite amount of skill and experience required to try an infringement suit for copyright?

A. Yes.

Q. Do you think you could engage a lawyer in the State of Nebraska to protect your interests, for less than \$5,000 [fol. 741] a year?

Mr. Nye: Objected to as calling for a conclusion; matter not within the knowledge of this witness.

A. I have no way of telling that; I was judging by the possible figure for a retainer which would imply no special work; but I am quite aware that any lawyer engaged in actual litigation must charge fees that must average \$5,000 or more a year.

Q. Are you in a position to pay that fee?

A. No.

Q. From time to time when your compositions were pub-

lished were rights granted to producers or manufacturers of mechanical records and piano rolls to use your compositions?

Mr. Nye: Objected to as immaterial.

A. So far as I know, no such records were ever made of any of my compositions.

Q. Didn't I understand you to say that some one made some records of one of your compositions?

A. Yes; "Francita's Serenade"; the piece is known by two titles; "Francita" from the title of the operetta by Franz Lehar, in which appeared a serenade whose title as a song—it was originally from the German—was "Blaues [fol. 742] Himmelbett," literally "Heavenly Bed of Blue". The necessities of general, shall be say, purity of American publications forced me to change the "Heavenly Bed" to "A Little Nest," and the song came out in this country as "Heavenly Nest of Blue".

Q. Who published that?

A. E. B. Marks.

Q. Did E. B. Marks grant mechanical rights to it?

A. Yes.

Q. Did you receive royalties for the mechanical rights?

A. Yes.

Q. Do you know whether this particular record was by Kreisler?

A. He made that violin record. I am not sure that I shared in that record, because Fischer also made a record by Jeritza; I also shared in that record. My recollection is that of the mechanicals I received no royalty. I know Kreisler did make a record on the music of that piece.

Q. Did you receive royalties from the record made by Jeritza?

A. That song came later, because it was sung by Richard Tauber at several concerts. That was one of the popular songs in his repertoire and he performed it publicly several times.

[fol. 743] Q. Did the manufacturer of the record made by Jeritza have the right to license anyone to publicly perform for profit that composition?

A. No, not so far as I know.

Q. Did you ever give any publisher that right?

Mr. Nye: Objected to as immaterial.

A. No.

Q. Did E. B. Marks ever give that right, so far as you know?

Mr. Nye: Same objection.

A. No.

Q. Have you any control over the manufacture of that record, that Jeritza record, with respect to the public performance for profit?

Mr. Nye: Same objection.

A. Personally I have no control.

Q. Have you any control over the sale of those records?

A. Only through my publishers.

Q. Has your publisher any control over the sale of those records?

A. Presumably the publisher can restrain the manufacturer of the records from using them in any way except as a phonograph record.

Mr. Nye: I want to make an objection to that last question—[fol. 744] the subject matter is not within the knowledge of the witness; the matter is fixed by law, as I understand it.

Q. Has the publisher the right to interfere with the sale of the record as a mechanical record?

Mr. Nye: Objected to as calling for a conclusion; matter not within the knowledge of the witness.

A. The publisher could probably interfere with it if he found that the sale was intended for public performance not included in the contract between the record company and the publisher.

Mr. Nye: I move to strike out the answer as not responsive.

Mr. Frohlich: I consent to it.

Q. Forgetting the public performance, has the publisher or have you any control over the sale or disposition of these mechanical records once they are made by the manufacturer of the records?

Mr. Nye: I object to that as calling for a conclusion as to a matter controlled by law.

A. So far as I know, I have no control.

Q. Do you wish to continue your present contract, Exhibit 1, with the Society?

[fol. 745] Mr. Nye: Objected to as immaterial.

A. Yes.

Q. Is the contract now being carried out by the Society and by you?

Mr. Nye: Same objection.

A. Yes.

Q. Have you been receiving royalties from the Society since June 28, 1935, under this contract?

Mr. Nye: I object to that; same objection.

A. Yes.

Q. Do you consider this contract of value to you?

A. I do.

Q. What value do you place on it in dollars and cents?

Mr. Nye: Objected to as calling for speculation of the witness, not a statement of fact.

A. The value at the moment is \$400 a year to me.

Q. Is there reasonable likelihood that this contract will be continued upon its expiration?

Mr. Nye: I object to the question as calling for speculation.

A. Yes, there is.

Q. As a matter of fact, since you have joined this Society you have executed a similar contract each five-year period with them?

[fol. 746] A. Yes.

Q. Have you reason to believe that you will continue to execute similar contracts each five years with the Society so long as you live?

A. Yes.

Mr. Nye: Same objection.

Q. Have you reason to believe that your royalties under this contract and the renewals of the contract will continue at the same rate of royalties or possibly a greater rate of royalties?

Mr. Nye: Objected to as calling for speculation by the witness.

A. Yes.

Q. What do you base that hope on?

Mr. Nye: I object to the question as calling for speculation, not a statement of fact.

A. I base that hope on the fact that since the records show that my compositions, my work, has become more and more widely used on the radio and in other ways for entertainment, that the Society will more and more recognize that fact and reward me accordingly so far as reasonably possible.

Mr. Nye: I move to strike out the answer as clearly not responsive, and hypothetical, speculative, not stating any facts.

[fol. 747] Q. Now, if this existing contract between you and the Society, Plaintiffs' Exhibit 1, were cancelled, would you receive any compensation from the Society?

Mr. Nye: I object to that as calling for a conclusion, speculation, and immaterial.

A. I see no reason to think so.

Mr. Nye: I move to strike out the answer as not responsive.

Q. If this contract, Plaintiffs' Exhibit 1, were cancelled, would you receive any compensation from the users in the State of Nebraska for the public performance for profit of any of your compositions?

Mr. Nye: I object to the question as calling for speculation, calling for a conclusion.

A. I would definitely receive no return, unless I found ways of forcing a return. No, I would not.

Mr. Nye: I move to strike out the answer except the word "No".

Q. If this contract, Plaintiffs' Exhibit 1, were cancelled, would you receive any compensation from any other source anywhere for the public performance for profit of your compositions?

Mr. Nye: That is objected to as immaterial; speculative.

[fol. 748] A. No, unless I found ways of turning up each use and spending the necessary funds to secure a return.

Mr. Nye: I move to strike out the answer, all except the word "No", on the ground that it is not responsive.

Q. Have you the funds with which to enforce your rights and to obtain royalties for the use of your compositions for public performance for profit, if this contract, Plaintiffs' Exhibit 1, is cancelled?

Mr. Nye: I object to that as immaterial; having been asked and answered and gone over in detail.

A. No.

Q. Have you some knowledge of the radio business?

A. Yes.

Q. You yourself are a commentator and broadcaster?

A. Yes.

Q. And have been for some years?

A. Almost since the very start of radio.

Q. Do you know whether or not radio stations in the State of Nebraska frequently perform compositions that emanate outside of the State of Nebraska?

Mr. Nye: I object to that; no proper foundation laid.

[fol. 749] A. I do know that.

Q. Will you tell us on what you base that information?

Mr. Nye: Objected to as immaterial.

A. I base that information on my knowledge of net work broadcasting in which I have frequently taken part and in which I know that various stations in the State of Nebraska are active.

Mr. Nye: I move to strike out the answer as stating a conclusion only.

Q. Please define "net work broadcasting", Doctor.

Mr. Nye: I object to that as no foundation having been laid.

A. Net work broadcasting is one which originates at one central station such as in New York and is carried over a number of local stations connected with that station.

Mr. Nye: I move to strike out the answer as a statement of a fact which is clearly not within the knowledge of the witness.

Q. How are these stations connected up?

Mr. Nye: Objected to; no foundation laid; immaterial.

A. I am not a scientific expert, but my feeling is that the local stations——

Mr. Nye: I object to any statement of what his feeling is.

[fol. 750] A. (Continued) My knowledge of broadcasting is that local stations are connected by direct wires with the central station.

Mr. Nye: I move to strike out the answer on the ground that it is a statement of fact not within the knowledge of the witness.

Q. Have you ever yourself broadcast over net work stations?

A. Yes.

Q. What stations?

A. I have been on the NBC on both Red and Blue net works, the National Broadcasting Company; and also Columbia net works, many times.

Q. When you say "NBC", what do you mean by that; what does that stand for?

A. NBC means National Broadcasting Company, which controls two net works, that is to say, two groups of local stations, one of which is known as the Red net works and the other as the Blue. One of these net works originates in the New York station WEAJ, and the other in the New York station WJZ.

Mr. Nye: I move to strike out the entire answer, and object to the question on the ground it is wholly immaterial.

[fol. 751] Q. To what parts of the country are these broadcasts which originate in New York City carried by the broadcasting company?

Mr. Nye: Objected to as immaterial; no proper foundation.

A. All over the country.

Q. Are they carried into the State of Nebraska?

Mr. Nye: Same objection.

A. I am certain there are stations in the State of Nebraska that are connected with those stations.

Q. Do you know KOIL in Omaha and Council Bluffs?

Mr. Nye: Objected to as immaterial.

A. Yes.

Q. Do you know WOW in Missouri?

Mr. Nye: Same objection.

A. Yes.

Q. Do you know what net work those two stations are affiliated with?

Mr. Nye: I object to the question as immaterial; no foundation laid.

A. No, I do not.

Q. If these two stations just named were on the National Broadcasting Company net work, would the broadcast performances that emanate from the New York stations of the [fol. 752] National Broadcasting Company be carried over these local stations?

Mr. Nye: I object to that as clearly not within the knowledge of the witness.

A. The answer is Yes, and it is my impression they are quite large stations.

Mr. Nye: I move to strike out the latter part of the answer, from the words, "It is my impression".

Q. Assuming you were acting alone and no longer a member of the Society, and you broadcast one of your compositions outside of the State of Nebraska or you licensed the broadcast of one of your compositions outside of the State of Nebraska at some station, say in New York, would you be willing to have a radio broadcasting station in the State of Nebraska rebroadcast that performance without any payment to you?

Mr. Nye: I object to the question as immaterial, calling for speculation, not a proper hypothetical question.

A. My attitude would be the same as toward the fee for my actual performance, which is always larger if it is given on a net work broadcast than if it is given on a local station alone.

[fol. 753] Mr. Nye: I move to strike out the answer as clearly not responsive.

Q. Are you willing to have a radio broadcast in the State of Nebraska perform one of your compositions without paying you anything therefor, providing such performance comes in from a broadcasting station located outside of the State of Nebraska?

Mr. Nye: I object to that as wholly immaterial; calling for a conclusion.

A. I am not willing to have such broadcast made unless the payment at the source includes payment for local broadcast.

Mr. Nye: I withdraw the objection; let the answer stand.

Q. Were any of your works ever broadcast in foreign countries?

Mr. Nye: Objected to as wholly immaterial.

A. Yes.

Q. Did any of those foreign countries broadcasting your works send the performances into the United States on short wave?

Mr. Nye: I object to that as wholly immaterial; not within the knowledge of the witness.

A. I beg your pardon; I misunderstood your former question. My works have been broadcast to foreign countries. [fol. 754] tries. I have not initiated any broadcast in foreign countries.

Mr. Nye: I move to strike out the voluntary statement of the witness; not responsive to any question.

A. The question was, whether my works had been broadcast in Europe. I misunderstood the question.

Mr. Nye: I move to strike that out also.

Q. Do you transact any business in Nebraska?

Mr. Nye: I object to that as immaterial.

A. Not at the moment.

Q. Have you any agent in Nebraska?

Mr. Nye: Objected to as immaterial.

A. No.

Q. Are you willing to have Nebraska courts take jurisdiction over your property at this time?

Mr. Nye: Objected to as immaterial.

A. No.

Mr. Frohlich: You may examine.

Cross-examination.

By Mr. Hotz:

Q. Doctor, how old are you?

A. I am fifty-three.

Q. You say that the ASCAP is a necessary organization [fol. 755] for you and others similarly situated, do you not?

A. Yes.

Q. Largely in the protection and detection of violations of the copyright act, isn't that true?

A. I would say more than that; for the general protection of the performing rights of my creative works.

Q. The public performance rights. But the Society does fix the public performance licenses, does it not, the organization does fix prices?

Mr. Frohlich: I object to that as incompetent, irrelevant and immaterial.

A. Prices, so far as my individual works, are by no means fixed, since I draw my royalties simply on the classification, the amount of public performances that my works are getting. But I have never had any indication from the Society that an individual price was stipulated for any work of mine nor have I ever been told that the blanket license that is paid by the year by users was in any sense fixed.

Q. Who determines the price of the public performance rights that ASCAP charges the users; who determines it?

A. The executives of ASCAP determine that.

Q. What amount of the copyrighted music of the United States would you say was controlled in that manner by ASCAP?

Mr. Frohlich: I object to that on the ground that this [fol. 756] witness is not qualified; no foundation for that question.

Q. If you know.

A. I have no knowledge of it.

Q. Is it a substantial figure?

A. Yes.

Q. Very substantial?

A. ASCAP includes the majority of the popular composers of standing.

Q. When you receive money from ASCAP you don't receive it on the basis of your compositions that have been used; you receive from them a sum of money which is determined by the classification to which they assign you; isn't that right?

A. That is true, but the classification is assigned on the basis of the frequency of the public performance of my works.

Q. According to whose determination?

A. The determination of a classification committee working with all the statistics available, gathered in multitudinous ways.

Q. Have you attended meetings of the board of directors of ASCAP at any time?

A. I have attended some meetings of the Society and I [fol. 757] have attended a meeting of the classification committee.

Q. Are you on it?

A. I am not a member of the board of directors and therefore never attended them.

Q. Were you, ever?

A. No.

Q. As a member you have nothing to do with the electing of that board of directors?

A. I have my vote.

Q. Did you ever vote?

A. There have been votes every year; there are ballots sent out, so far as I know.

Q. Do you of your own personal recollection remember, of ever having cast a vote for director of the Society?

A. Well, whether for the board of directors or not, I don't know. I know I am a voting member of the Society and have a right to express my opinions and have expressed them before the classification committee and have also expressed them to Mr. Buck, the President.

Q. What sort of things do you remember voting on, as a member of that Society?

A. There have been votes at our annual business meeting, on general questions of policy, and there are frequent votes as to members of committees, and then the classification committee would be appointed, which of course is a very important committee, and committees which would hear any complaints that might come up, or anything of that sort. In other words, if a member of ASCAP ever has any complaint or anything he wishes to bring before the executives it is always easy to do so.

Q. Of course you have a grievance committee of some sort. Did you ever read the articles of association of ASCAP?

A. Yes, I have read them.

Q. What particular thing did you ever vote on as a member of that organization, that you recall; just tell me one thing?

A. I have already answered that question. I said my recollection is I voted at various times on members of committees, like the grievance committee and classification committee.

Q. You mean you elected them?

A. Yes, I think there have been votes on them.

Q. When?

A. I am not familiar enough to say that; I know there are a number of ballots sent out.

Q. You know that the articles of association of ASCAP provide that the directors are elected by themselves; they [fol. 759] are the ones who elected the directors, the directors themselves; isn't that true?

A. I know that a great deal of machinery of ASCAP has been handled by—I won't say a little group, but a group that could be called the directors, a group in whose hands the Society as a whole has been very glad to leave these important problems. They are able men.

Q. Who are those men; who are the chief men in charge of the ASCAP situation?

Mr. Frohlich: I object to that as characterizing, incompetent, immaterial.

A. I frankly couldn't answer that because I don't know well enough. The men I know personally in ASCAP are men for whom I have the greatest respect and in whom I have the greatest confidence—Gene Buck, Mr. Paine, the general manager, and Mr. Mills; they are my chief con-

tacts; they are the men to whom I write or talk if I have any ideas or suggestions.

Q. Those three men stay here in the City of New York, do they not?

A. Yes; not all the time.

Q. They are the moving spirit largely of the Society, are they not?

Mr. Frohlich: I object to that question on the ground [fol. 760] that it is characterizing, incompetent and immaterial.

A. I would by no means limit myself to those men as being the guiding force of ASCAP. They are the men who I happen to have my contacts with.

Q. Who are the guiding lights of ASCAP, in your mind? I want to get your view on that subject; as a member of that Society I want your views who they are.

A. They are officers and general manager. Mr. Mills was former general manager. They are the three men who are the most important men in ASCAP. There are important men and writers; I know Mr. Deems Taylor; he is a director; Mr. Bernstein, and others.

Q. Mr. Berlin?

A. I know other men but I don't come in contact with them officially.

Q. These men, that is, Buck, Mills and Mr. Paine, those three gentlemen, they devote their sole and exclusive time to the business of ASCAP, do they not?

A. Yes, so far as I know.

Q. Can you give me an idea, based upon the experience that you have had, of about the percentage of the copyrighted music that ASCAP controls, in the manner in which it does its business?

[fol. 761] Mr. Frohlich: I object to the question on the ground it is incompetent, irrelevant and immaterial; no foundation laid for it; the man is not qualified; nothing to do with the case.

A. I don't know the exact percentage.

Q. I didn't ask you the exact percentage; about what percentage?

Mr. Frohlich: Same objection.

A. I would be guessing, and I would rather not guess. I know a rather large percentage of copyrighted music is controlled by ASCAP.

Q. It is more than half of it, wouldn't you say?

Mr. Frohlich: Same objection.

A. I couldn't say.

Q. Do you know where that information could be obtained?

A. Yes.

Q. Where?

A. In the copyright office in Washington.

Q. In the copyright office in Washington, compared with the records of ASCAP; isn't that true?

A. Very true, that is to say, the catalogue of ASCAP, which I imagine is available, could be compared with the full copyright list in Washington, and my guess is that [fol. 762] it would be found that a tremendous number of compositions are copyrighted every year in Washington by non-members of ASCAP.

Q. There is no objection to anyone copyrighting any music they want to mail down to Washington, with two dollars?

A. It is a very small matter to send in an application. There is a great deal of that music available and the composers are very anxious to have their music played on the radio and made available.

Q. As a matter of fact, ASCAP controls, does it not, all the music, substantially all the music that has merit?

Mr. Frohlich: That is objected to on the ground it is improper, incompetent, irrelevant and immaterial, no foundation for it; nothing to show that this witness is qualified to speak on the subject.

A. My answer to that question, from my wide knowledge of music in general, is that ASCAP controls an infinitesimal amount of the music of merit in the world.

Q. I mean the copyrighted music.

A. All music was copyrighted at one time. You have raised the question, by your question, of the available music which is in the public domain; it outnumbers tremendously [fol. 763] the amount of material which is controlled by ASCAP,—that I know.

Q. You are speaking now of copyrighted music?

A. All that music was copyrighted originally, but so much of it is now in the public domain that it is available to any radio station or artist,—music in the public domain which includes all the folk music of the world and all the music of Bach, Beethoven, Wagner, Schubert and hundreds of other composers, all of which is available at any time if a user wishes to make use of it.

Q. Those men were all great artists?

A. Those were the greatest, all of greater importance in the history of music than any particular member of ASCAP. If you say the great music of the world you must include the great masters of music in the public domain.

Q. They were undoubtedly happy in the thought that they had contributed greatly to the art of music?

Mr. Frohlich: I object to that; you are arguing with the witness.

A. Most of those composers received very little for the composition of their music. But since most of them are dead for many years, the law says their works are in the public domain and open to the use of anyone who wishes.

Q. In connection with the falling off of sales of sheet [fol. 764] music, did I understand you to say that your particular compositions with your publisher show about two thousand copies a year that they were selling now?

A. Not now; that was at the top.

Q. At the top two thousand copies a year?

A. Yes.

Q. Now it has gone down to what figure?

A. My last royalty statement, as I said under direct examination, was a little over fifty dollars, representing the six months' period.

Q. Translated into number of copies, that is how much?

A. It can be figured out in this way: my share as a writer of the words is one-half, a cent and a half per copy; there is a royalty of three cents per copy divided between the music and the words. On the lyric "Down South", which is my best composition, I have drawn one and a half cents and 33 and one-third from mechanicals; add all that together and also take into consideration that that check of slightly over fifty dollars represents not only "Down South" but several other works, it couldn't possibly have sold more than a few hundred at the outside.

Q. A few hundred?

A. In the last year. My mathematics may not be very good.

[fol. 765] Q. There is no objection to increasing the price of sheet music if the author or composer and publisher wish to do it?

A. No objection except the good old rule of supply and demand. That law still works.

Q. If you get the price up too high it just won't sell?

A. Sheet music has always been priced as high as could reasonably be expected to be collected. The prices of sheet music couldn't be put higher than they have been. The tendency is to lower prices.

Q. If you are receiving \$400 a year now from ASCAP for public performance rights and if the public performance rights are included in the price that you and your publisher fix at the time that the music is sold and collected when the music is sold so that you had a public performance price added right in there, you would have no complaint to make whatever about infringement of public performance rights?

Mr. Frohlich: I object to that on the ground that it is speculative; incompetent.

A. My only answer to such a question is, the possibility has never been suggested, and it seems to me entirely inconceivable that a publisher should be able to control public [fol. 766] performance rights or to put a price on it. If you compare the \$400 return that I have received in the past year from ASCAP with this 4,000 performances of only one song on the air, and compare that with what I got from sheet music, you will see why I smile.

Q. Have you ever read the Nebraska statute that is in question?

A. I am not sure that I have. I only know in a general way what it is.

Q. What price does your publisher charge for your sheet music when he sells it?

A. Of course, he figures on the basis of a wholesale price.

Q. What is it?

A. Usually about twelve or twelve and a half cents.

Q. Per copy?

A. Yes. It varies, depending on type of music, the sort of piece, whether a production number—that will be sold

at a higher price; a piece of movie music will be sold for more.

Q. If the public performance rights will be included in the sales price and the sales price were arranged by yourself and your publisher high enough to cover a substantial and reasonable income for yourself, then you would have no necessity of an organization such as ASCAP?

[fol. 767] Mr. Frohlich: I object to that question as speculative and assuming a state of facts not in evidence.

A. I think I can answer that by saying that my total returns from sheet music would be zero; it would be nothing. If the price were put up to include anything at all for public performance rights the sale of sheet music would cease automatically.

Q. Where do you assume that the money is coming from that you get from ASCAP?

A. I know very well where.

Q. Where?

A. From the users, of which a very considerable percentage is paid into the treasury, which is divided among those whose works are entitled to recognition.

Q. You don't suppose those people would cease to use music simply because the public performance price was put on the music?

Mr. Frohlich: That is objected to as speculative and calls for the operation of the witness's mind; it is something he does not know about,—asking what users might or might not do; it is incompetent and immaterial.

A. I can answer that question in this way: I believe that [fol. 768] they would automatically cease to use it because they couldn't afford to pay the price which the publisher would want; and the case was very clearly proved when the Warner Brothers with their publishers ceased; rather than pay the prices that Warner expected them to pay, they said, "We would rather not use your music," and no Warner music was used during that entire period; the entire time that Warner was outside of ASCAP the music of Warner was boycotted by the radio stations and all the others using music.

Mr. Hotz: I move to strike out the entire answer as not responsive.

Q. Warner Brothers were assuming a similar position to music that ASCAP did?

A. Yes.

Q. And it became necessary for users of music to have two licenses if they wished to be free from infringement?

A. They didn't have to have two licenses, if they wanted to substitute the Warner license for the ASCAP license. I have heard of no cases where anyone chose the Warner license in place of the ASCAP license. In most cases I found that the user simply refused to deal with Warner. The only exceptions were certain small stations. Warner licenses were so much higher than the comparatively small [fol. 769] charge by ASCAP. Users of music in general refused to do business with any such concern like that which controlled large publishers and several motion picture houses and controlled one of the large motion picture companies.

Q. Do you know of any publishing houses that publish vocal and instrumental music, of any size or consequence, that are not members of ASCAP?

A. Any large publishing houses?

Q. Or are they all in the Society, largely?

A. I am not sure, because there are large publishing houses abroad.

Q. I mean, in the United States.

A. In the United States? I don't know of any, but I might be wrong. My impression is—

Q. All or substantially all are in it?

A. Yes, I think they are all members of ASCAP.

Q. When a man copyrights a piece of music or goes to his publisher and makes a deal with his publisher, does he negotiate? Tell us how this is done.

A. The publisher gets a contract and the composer gets a contract as the creator of the work, which is a written contract. There is a contract known as the regular song writers' contract, which always calls for the payment of royalty on the basis of three cents per copy of sheet music, [fol. 770] to be divided between the writers of the music and the words. Each man gets the same. Recently, with some exceptions, the usual share of the mechanical reproductions is thirty-three and one-third.

Mr. Frölich: Have you completed the answer?

A. (continued). The main thing is, the publisher assumes the expenses of publication and he agrees to bring out the composition and to exploit it and to pay the creator this royalty.

Q. In other words, the creator of music is helpless without a publisher, so far as getting his composition on the market is concerned; is that right?

A. No; I would hardly admit that.

Q. They would have to do their own publishing?

A. Yes. Sometimes—

Q. Irving Berlin—

Mr. Frohlich: Let him answer.

Q. You have answered the question. It is sometimes done. Irving Berlin is a good example of it? Irving Berlin publishes his own compositions?

A. Irving Berlin was first handled by various publishers before he organized his own publishing house. A man is always free to publish his own compositions.

Q. The publisher gets one-half of the money that ASCAP [fol. 771] collects from music users throughout the country, including Nebraska?

A. I don't know the figures, but my impression is that the total receipts for distribution are divided equally between the publisher members and the writer and composer members.

Q. And the bill of complaint says there are about 123 publisher members and they publish a list of them. Those 123 publisher members, then, receive one-half of the net proceeds that come into ASCAP from the State of Nebraska and elsewhere, according to your version; isn't that right?

A. I don't know the details of that; I imagine that is correct, but I am not an officer of ASCAP, and I don't know.

Q. Do you know how many composer members there are in the Society?

A. No, I don't know the exact number.

Q. I want to find out what you know about this Society. What is your best judgment as to the number of members?

A. I know that the Society has its European affiliations.

Q. I am not talking about its European affiliations; I am talking about ASCAP composer members.

A. I haven't checked the total members. I imagine it runs between seven and eight hundred.

[fol. 772] Q. Now, the money, then, that ASCAP takes in is divided between those persons that compose this half or the other, whatever they are; the composer members; and the other half, the 123 publishers?

A. I am not sure that is so. You are asking now questions that I am not in a position to answer at all. I haven't that type of mind. My mind doesn't work about those matters. I know my own problems and what ASCAP means to me. As to the publishers, I can't say.

Q. When Warners pulled out of ASCAP or settled its differences with them, do you know anything about ASCAP's refusal to reduce its fees to compensate the users for the withdrawal by Warner?

A. I don't know the financial details of the situation at all.

Q. Have you ever tried to figure out a plan of collecting your public performance rights at the time that copyrighted music was sold; have you ever put in any time or thought on that subject?

A. I have to be convinced that I could work out any plan.

Q. You never tried it?

A. Yes, I have tried to keep track, for my own personal satisfaction, of the performances that were made, and I frequently get letters from people asking if something of [fol. 773] mine can be performed at a certain place, and if it is a charity where they are not making a profit out of it I have given a permission without bothering ASCAP at all. Another place where they want something where they are making a profit, I said I had no right to do so.

Q. There is no separation of the funds that you derive from the users of copyrighted music, by ASCAP; is that true?

A. Any separation?

Q. No separation of the funds? They don't go out and collect royalties on your music and turn it over to you?

A. No. The beauty—

Q. I am not asking you about the beauty; I am asking what ASCAP does.

A. ASCAP deals with lump sums, which it distributes equitably.

Q. Give us the dates of your copyrighted music.

A. I can't do that off hand.

Q. You can't do that off hand?

A. No. The records are with my publishers, mostly E. B.

Marks. They run roughly from 1920 or a little earlier; some are earlier than that; they run over the last 18 or 20 years.

Q. When is your nearest expiration of copyright that you can give us?

[fol. 774] A. I imagine "Chansonette" would probably be the nearest one for renewal, and that has rather lost its value by being superseded by "The Donkey's Serenade." "Chansonette" you know was something I worked out with Friml in my early days with the American Piano Company. I am not thinking seriously about renewals; they are at least ten years ahead of me.

Q. When you estimated for Mr. Frohlich the value of your copyright, you were merely speculating, were you not, on those figures?

A. I was judging by the average return during the years I have been drawing royalties and the possibility of royalties for the future; and I was naturally somewhat influenced by the confidence that I have in the compositions.

Q. How long have you been getting \$400 a year from ASCAP?

A. Only during, I think, the past year, at the outside. I think this is the second year I am on that classification.

Q. It was increased up to \$400; it was never cut down?

A. It was never cut down? Yes, I think once my classification was reduced.

Q. What did you say it was before you got \$400?

A. I think it was \$80 a year.

Q. How long was it \$80 a year?

[fol. 775] A. Five or six years, is my impression. I am talking simply from a general recollection. It finally raised, and this final jump to \$400 was from 200; from 200 to 400; it was doubled.

Q. Was it increased due to the popularity of your music?

A. It was due particularly to the fact that I was getting more use of my music than ever before.

Q. How do you know?

A. Because I had the figures. I was given the figures by ASCAP—my publishers, I mean, who had gotten them from ASCAP investigators.

Q. How does ASCAP judge that?

A. There are paid people who do that work, paid, I imagine, by ASCAP.

Q. It is largely over the radio, isn't it?

A. Radio is by far the largest user.

Q. Then the present value of your public performing rights is fixed at \$400, is that right?

A. That is the way it is estimated by ASCAP at present.

Q. Suppose they decide to pay to you \$200 instead of \$400, what would you do about it?

A. I would probably object and would have to be shown good and sufficient reason for the change. In fact, once [fol. 776] when I was reduced I objected.

Q. What did you do?

A. I came to the classification committee and stated my grievance.

Q. Suppose it had not complied with your request, what would you have done?

Mr. Frohlich: I object to that as highly speculative.

A. I think I would be free to resign from the Society.

Q. Then you wouldn't have gotten anything.

A. I don't see how I could. I have to trust ASCAP to give me a square deal, and I try to do my part. I trust my publisher the same way. He gives me a split of the royalties; I have no way of checking the figures; he told me he sold 100 copies of "Down South" and I have to accept that.

Q. You have no way of knowing the value of your public performance rights, for instance, next year; there is no way of estimating that?

A. No.

Q. You have no way of estimating nor of figuring in two or three years from now on the balance of the period of your copyright?

A. I have never had any value set upon my public performance rights until I became a member of ASCAP. There was no public performance value in any of my work. Whatever value there is in the future is due to my membership in ASCAP; otherwise it would cost more than it would bring me.

Q. It would depend on the deal that you and your publisher might work out, is that right?

A. My publisher would do nothing about that. My publisher is too concerned with selling sheet music. My publisher has never shown any interest in trying to protect my public performance rights. My publisher knows I am well taken care of by the Society.

Q. In the radio broadcasting from the emanating station here in New York, it comes out to Nebraska, does it not, by wire?

Mr. Frohlich: Objected to; if you state that as a fact we will concede it.

A. That is my impression.

Q. After it goes to Nebraska by wire it is re-broadcast in the local station; isn't that true?

A. Essentially I imagine that is what happens. I am not a scientist; I don't know the exact process. I know a program emanating in a New York station is distributed through various local stations, which I assume is through wires and which could be called re-broadcasting. I am not [fol. 778] familiar with technical terms.

Q. A copyrighted program originating here in New York and picked up in Nebraska must have, in order to grow into being or use, a local broadcasting station out there in Nebraska where it is picked up and re-broadcast; is that true?

A. No; there are stations in New York powerful enough to be heard directly in Nebraska. I am quite sure of that.

Q. What ones, for example?

A. I think WOR, among others. I was on WOR here in New York on a purely local broadcast,—

Q. Not as a practical matter?

A. I might say as a matter of fact I received letters from Oklahoma and Texas, where I was heard at that time.

Q. That is an exceptional case, isn't it, Doctor; not a practical proposition?

A. You asked me whether it was necessary to have a local station in Nebraska in order to hear a New York broadcast. I have had the experience of getting letters from Texas, after a local New York broadcast. There is also station WLW in Cincinnati, a tremendously powerful station, which does not require a net work at all. I think WLW has proved that it has gone into all the States of the United States, I think.

Q. You have testified, have you not, in infringement [fol. 779] suits?

A. Yes.

Q. About what kind of copyright infringement suits were those; between individuals that were quarreling about prior rights?

A. Usually a case of that sort is between an individual and a publisher, and sometimes a motion picture company where a copy of music has been used on the screen. An individual, as a rule, is trying to collect money from a publisher or from a motion picture company and says that his melody or his song has been stolen. In most of those cases I have appeared for the defendant because I always appear on the side which I feel is right in the case, and in the majority of the cases the plaintiff is merely imagining the fact that his music was taken, and that is the first thing for me to show. That is usually in a suit in which the individual is suing a publisher or a motion picture company.

Q. Have you ever testified in a case where the public performance rights were involved?

A. No, I don't think so. I would like to correct that last answer. There were a couple of cases in which public performance rights were definitely involved. There was a case in Syracuse in which a certain road house or some such [fol. 780] place of entertainment was trying to prove that every song, every popular song published, was in the public domain, because all these songs were based on the seven notes of the diatonic scale and the twelve tones of the chromatic scale, and therefore Irving Berlin or any other composer couldn't legally copyright any of his compositions. They actually tried to retain me as a witness on their side. I, of course, told them that their case was ridiculous. I then appeared for ASCAP to clear up a situation which was obvious, that since the United States had given a copyright for these numbers they are, therefore, entitled to legal protection; and even if one could find material that appeared many times, that its creator has put it together in this particular way, for which the United States Government had given him a copyright, and they were entitled to protection. That was a case where performance rights were included.

Q. Your publisher has the right from you, does he not, to give copies to users occasionally, particularly broadcasting companies and leading artists?

A. He has a right to give away such copies as he considers helpful for promotion of the number.

Q. As advertising?

A. Yes.

Q. What is one of the methods of popularizing a piece of [fol. 781] music that you know now?

A. The only way of popularizing music is by having it heard.

Q. And that, I presume, is the job of your publisher largely?

A. The publisher is principally interested in that; the creator is also.

Q. It is usually the publisher's job?

A. It should be, but if a publisher is not as largely interested in a composition as I am, I am trying to help it along, and I have done it.

Q. You advise with your publisher and fix the price that your sheet music is to sell, do you not?

A. No, the publisher does that.

Q. He decides that entirely?

A. Yes, he decides on the price that he thinks can get the best market.

Q. The composer, then, has nothing to do with the price that he gets for his sheet music? You want to go on record as saying that?

A. I wouldn't say that he has nothing to do with it. Of course he is consulted. I happen to be a writer of books also, and I am consulted by my publishers; but if they think that it will bring two dollars, that is the price, although [fol. 782] I think the proper price should be one dollar and I know I will not get as much by pricing it at two.

Q. So you do sit down and work it out with your publisher?

A. That is stating it a little too broadly. My publisher says, "I think we can sell this for such and such a price," and I agree.

Q. What way do you have of checking with your publisher the number of copies he has sold?

A. I have no way at all.

Q. Except his records?

A. I have to take my publishers word for it. If I thought a clerical error had occurred I should think that was justification for examining his records. I have no reason for thinking that a music publisher has falsified his records. He is doing the clerical work that I haven't the time to do or the facilities for doing.

Q. ASCAP doesn't do that for you?

A. With regard to performing rights.

Q. As to your publisher?

A. ASCAP is not interested in sheet music returns; that is my problem.

Q. You and your publisher?

[fol. 783] A. Yes.

Q. About what is the division that you have on sheet music with the publisher, between yourselves; what is the relative division of the price?

A. A song that will sell at wholesale for perhaps twelve or fifteen or perhaps twenty cents—I don't know if it goes as high as that—my share is three cents if I have done the words and music, or half of three cents if I have done the words alone, the publisher carrying the expense of printing, exploitation, cover design, and promotion in general.

Q. What is the biggest source of income of ASCAP? What is its biggest source of income? I want to know what you know about that as a member.

A. I have never inquired into that, but it is my assumption that radio contributes the largest sum to the income of ASCAP.

Q. Do you know how much it is annually?

A. No, I do not. I had some figures on that a year or so ago. I referred to them in some lecture, but I haven't they now.

Q. Do you know what the total income of ASCAP is annually?

A. I know it has risen gradually. I know it passed the [fol. 784] three million mark, and it may have risen to four.

Q. Where are the publishers of music located, largely; in what part of the United States?

A. New York is the chief center.

Q. Do you know of any large publishing house that is not a member of ASCAP?

Mr. Finkelstein: I object to that; it has already been asked and answered.

A. I will be glad to answer the question again, because I happen to know of a great many so-called publishers. In the music industry they are known as "song sharks." They publish a great many compositions. I know of one that has 80,000 clients, for each of whom they have published one piece, which has been entered by the United States Government at Washington. These so-called sharks are constantly offering to radio stations; they are trying to do

what a regular composer finds it impossible to do; they make claims which are absurd.

Q. Claims of what?

A. Claiming to be publishers and distributors. I think it has been proven that they collected a million dollars from amateurs, obtaining money from gullible amateurs. I have been fighting against these song sharks, but I know from my contacts with that business, if you can call it a business, [fol. 785] that there are thousands of compositions published and copyrighted every year outside of ASCAP, and if one such concern actually has 80,000 clients, which I believe is true, that concern might be called a larger publisher than anyone in ASCAP at the moment.

Q. Is there any merit to the publications of an organization such as you have mentioned, that makes fools out of people?

A. There is occasionally.

Q. By accident somebody will have something meritorious?

A. In fact, many songs do not arrive at publication which undoubtedly are worthy.

Q. The thing that I am trying to bring out, Doctor, is that the substantial number of all of the publishing music houses, that is, publishing houses that put out vocal and instrumental music, are members of the ASCAP organization.

A. I would say that a substantial amount of this popular music of commercial value is controlled by ASCAP.

Q. That is all for that. How do you pay this ten dollars to ASCAP, this membership fee? Do they bill you for it and you send them a check for \$10, or do they just take it, deduct it?

A. I get a bill and I send a check.

Q. And you send a check in?

[fol. 786] A. That is the way it has always been done. I have never known of any deduction, so far as I know, and I always paid my dues regularly.

Q. Buck, Mills and Paine are paid salaries, are they not?

A. My impression is that they are. I can't imagine anyone doing that amount of work—

Q. —for nothing. Do you know what Mr. Buck's salary is?

A. No, I do not.

Q. Do you know what Mr. Mills' salary is?

A. I do not know what any of those salaries are.

Q. Nor Mr. Paine?

A. No.

Q. Is Mr. Mills a composer, writer or author?

A. I don't know him in that way.

Q. Is that true of Mr. Paine, that he is not an author, composer or writer?

A. They have both been connected with publishing members, I am sure.

Q. I am getting at whether they are publisher members?

A. No.

Q. Nor composer members?

A. No.

[fol. 787] Q. I think Mr. Buck claims to have written compositions?

A. Buck is definitely a composer and writer. He did a great deal of work.

Q. How many years has it been since he did anything?

A. Buck's most recent writings have been largely for the Dutch Treat Club. He may have done things for professional shows. He was always one of the leading writers for Ziegfeld Follies. I know that Buck worked for the Society for several years without a cent of salary; I remember an annual meeting at which it was talked about.

Q. Do you know whether Buck draws from the Society any income from public performance rights?

A. My feeling would be that if he has any compositions still protected by copyright he would have a perfect right to that. I don't know the circumstances.

Q. What was your answer?

A. My answer was that if he still has any productive work still protected by copyright, he draws royalties, and they were perfectly justified. Mr. Buck is in the double position of being a creative writer and also a salaried official.

Q. As I understand it now, as a member of that Society, who fixes the price, we will say, that the broadcasting stations, for example in the State of Nebraska, pay to ASCAP?

[fol. 788] A. As I understand it, it is fixed by our board of directors or some committee working for that special purpose.

Q. Is that true of all other users?

A. I think that is true. I don't think any one individual decides upon those rates. The rates are fixed after very

careful examination. I know that in the case of motion picture theatres—

Q. That is all; you have answered the question. The point that I wanted to bring out further, Mr. Witness, is that they fix whatever charges or licenses that are collected for your music in the State of Nebraska.

A. It doesn't apply to me alone; the license is always a blanket license. Our committee, whatever it is, arrives at these rates through a careful examination of the profits made by the users in that locality; and it is definitely fixed in the case of a motion picture theatre by the number of seats in that theatre, something like one cent a seat.

Q. It happens to be ten cents.

Mr. Bennett: Ten or fifteen cents a year.

A. Per year? A ridiculously small sum; it is a very small sum, since they are so dependent on music. I thought it was a month.

Q. Doctor, do you know a definition, as applied, let us [fol. 789] say, to modern dance music, for such compositions as would be termed "popular" as distinguished from "standard"?

A. The distinction usually applied is that a popular work is transient or ephemeral, and a standard work is a lasting one. A popular work depends for its return upon a short and very happy life. A standard number depends on a long life, not necessarily so happy.

Q. Do you know of any popular music, now that you have given the definition, now in the public domain?

A. Yes.

Q. Give us some.

A. For example, all the songs of Stephen Foster; every song of Stephen Foster was written as a popular song.

Q. Under your definition would it not become standard now, under your definition?

A. It is still a popular song, however. Every popular song writer hopes that some of his popular songs will become standard in time.

Q. We are talking about today, Mr. Witness; we are talking about today. What I want you to answer, if you can, in the light of the definitions you have given, is, do you know of any popular; modern popular music that is in the public domain?

[fol. 790] A. Yes; a very good example is the tune of

"Loch Lomond" which is very popular at the moment, a tune in the public domain. The sheet music of it has been tremendously popular.

Q. Was that ever copyrighted?

A. It was a folk song. The sheet music was copyrighted only so far as the arrangement was concerned. Now, take the music of "Loch Lomond"—

Q. You have given that one. Any others?

A. Yes. I have mentioned Foster. I want to point out a specific song; the song "Oh, Susanna" was a campaign song for the Republicans. Mr. Landon used that song. It achieved a new popularity and certainly arrived at a sale of sheet music as the result of that. It was a popular song.

Q. Then you say that all of Stephen Foster's songs are in the public domain?

A. Yes, they are all in the public domain.

Q. Have you ever taken it up with Mr. Buck? Do you think he would agree with you on that?

A. Yes. It is available to anybody, as Foster wrote it. The original publications, which are in the library at Pittsburgh at the Foster Memorial, are in there. Anybody can use it.

Q. Is that true of "Loch Lomond"?

A. Yes. There is a copy of "Loch Lomond" in practically every song book in the world. When a man makes an arrangement of it, that is copyrighted.

Q. When the public becomes acquainted with it, do they want the original melody or do they want the modern arrangement?

A. The public must have the combination of both. The original melody is a necessity as a basis for the variations that modern swing puts into that basis. The reason the old tunes are being dragged out is because not enough modern melodies are being brought out by our men, so they bring out the old tunes and arrange them effectively.

Q. So that those new arrangements are kept copyrighted?

A. Yes; and any arranger in a studio or motion picture house or restaurant could take those tunes and make his own; and many of them do.

Q. ASCAP has a great amount of those copyrights under its control and supervision?

A. A very small percentage as compared with the original compositions which it controls.

Q. Give us some three or four outstanding musical com-

positions where the modern arrangement has been copyrighted and which otherwise were free but for that?

A. "Loch Lomond" is a very good example.

[fol. 792] Q. That is copyrighted; that is, the modern arrangement is copyrighted?

A. "Loch Lomond", I don't know how many arrangements there are; "Loch Lomond" is open to unlimited arrangements. I used a negro spiritual, "Oh, Yes;" I arranged that myself; I get royalties on the arrangement. A tune recently declared in the public domain is "Home on The Range".

Q. That is what I want to get at. Why do you say it was declared in the public domain?

A. Because there was some argument as to its origin. It was proved to have been written in Colorado. There was some litigation which determined it was not an infringement.

Q. It was free?

A. It was an old cowboy song. It appears in the Rotary Song Book; they get credit for the arrangement.

Q. Their arrangement?

A. Yes. I think the first man who arranged "Home On The Range" was David Guion; I think he was the first man to arrange it. He also arranged "Turkey In The Straw;" that was another old arrangement; and "The Arkansaw Traveler."

Q. You have used as an illustration, "Home On The Range." Can you give us, of your own knowledge, any useful arrangement of that song that is not copyrighted; do you have anything in mind?

[fol. 793] A. Yes.

Q. What, for example? I mean useful for commercial practical use.

A. You will find "Home On The Range" printed, I think, in a number—at least a dozen—of song books of the general type which contain most of the public domain material—in the Kiwanis and Rotary Song Books, and there is a book called "Everybody Sing".

Q. What I want you to exclude from your answer are those pieces of music that are in use for limited purposes. I want you to tell if you can those where there is a public performance right that is being collected upon. Can you tell any arrangement of "Home On The Range" where public performance rights are collectible, that is dedicated

to the public domain, ordinarily would be collectible, I mean?

A. I believe there must be some such arrangements. The arrangement that occurs in a general song book. Of course, where there is a new arrangement, such arrangement is the property of the arrangers. It remains the property of the orchestra leaders. They are jealous of those properties.

Q. They are of some value to an orchestra leader in building up his music library?

A. Yes; they are very jealous of them. I can refer you to two articles which I wrote for Cosmopolitan. The article [fol. 794] on "Jazz" sets forth that case very clearly. The leaders don't want it published. They hold onto it. It is their own manuscript.

Q. How are public performance rights handled in regard to such pieces?

A. There is no way to get them; they are carefully guarded. If anyone picked them up from a radio performance they would be sued immediately.

Q. Those orchestras and those people control their own public performance rights?

A. Yes, for their own pieces, for a limited number of pieces.

Q. Are there a large number of authors and composers that you know that are not members of ASCAP?

A. There are many. All these so-called would-be composers; of course, the country is full of those. The very fact that a composer must have five songs published before he can become a member holds the number down considerably.

Q. Before a person can get into ASCAP he has to have the approval of the Society's directors?

A. Any person who has had published five pieces of music by a recognized publisher, not privately, is eligible to ASCAP. The record is then examined, and if the pieces are either of a type that represents a popular commercial or [fol. 795] of a type that represents a musical value—and we have many such composers in ASCAP—then that person is elected to ASCAP.

Q. What do you mean by "recognized publisher"?

A. By "recognized publisher" I mean a publisher who does a legitimate business at a definite address and who brings out songs regularly, in fact, who maintains an office force and does business in a way that any reputable con-

cern would. In other words, I can make myself a publisher by bringing out only one piece of music, but I wouldn't be a recognized publisher.

Q. Are there any recognized publishers that you know about that are not members of ASCAP?

A. There may be; I am not prepared to say.

Q. It would be the exception if there were?

Mr. Finkelstein: Objected to. There is no foundation for that.

Mr. Hotz: You qualified the witness as an expert.

A. I would have to go through the list; I would have to check it up.

Q. Have you a list of publisher members of ASCAP here? Otherwise I would be glad to furnish one.

A. Actually I think I have seen such a list.

[fol. 796] Mr. Hotz: That is all.

Redirect examination.

By Mr. Frohlich:

Q. Do you know, Doctor, of any associations of users of music?

A. The National Broadcasters Association.

Q. Do you know of any other association?

A. Well, there are all kinds of associations of theatrical managers and so on.

Mr. Nye: We object to that as immaterial.

Q. Do you know of any association of motion picture exhibitors?

Mr. Nye: That is objected to as immaterial.

A. Yes.

Q. Any dance hall association?

A. Yes.

Q. Do you know whether any of those associations ever negotiated with the Society with respect to rates?

Mr. Nye: Objected to as not within the knowledge of the witness.

A. I imagine that there was.

Q. Have you heard of the Hotelmen's Association?

A. I know there is such an association.

(Recess until 3:45 p. m.)

[fol. 797] DEPOSITION OF ABRAHAM SCHWARTZ

[fol. 798] (After recess) 3:45 p. m.

ABRAHAM SCHWARTZ, called as a witness on behalf of the plaintiffs, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. Mr. Schwartz, what is your residence?

A. 91-09 Baldwin Avenue, Forest Hills, New York.

Q. What is your occupation?

A. Business manager.

Q. Of what company?

A. Irving Berlin, Inc.

Q. How long have you been connected with that company?

A. Eighteen years.

Q. Is Irving Berlin, Inc. a corporation?

A. Yes.

Q. Under the laws of what State?

A. New York State.

Mr. Frohlich: Do you concede that they are a New York corporation?

Mr. Nye: We concede that they are a New York corporation and that this man is the manager.

Q. What is the business of that company, Mr. Schwartz?

[fol. 799] A. Music publishers.

Q. How many years has it been in existence?

A. Since 1919.

Q. How many years have you been connected with that company?

A. Eighteen years.

Q. Where is the office of Irving Berlin, Inc. located?

A. 799 Seventh Avenue, New York City.

Q. Is that office occupied under a written lease?

A. Yes.

Q. What is the yearly rental under that lease?

Mr. Nye: I object to that as immaterial.

A. \$4800 a year.

Q. How many years has your lease to run?

A. To September 30, 1940.

Mr. Nye: We object to that as immaterial.

Q. What is the business done by that corporation; what does it consist of?

A. Publishing of music.

Q. Has that been the business of the company since its inception?

A. Yes.

Q. What has been the gross business of the corporation for the past eighteen years; do you know?

[fol. 800] Mr. Nye: Objected to as immaterial.

A. I don't know.

Q. What was the gross business done by the corporation in 1936?

○ A. I don't know; I would have to look it up.

Q. Is this corporation a member of the American Society of Composers, Authors and Publishers?

A. Yes.

Q. I show you this document dated December 19, 1935, and ask you whether you recognize the handwriting and the signatures (handing paper to the witness).

A. Yes, I do.

Q. Whose handwriting is it?

A. S. H. Bornstein, Treasurer of our company.

Q. What is the other signature?

A. Joe Young.

Q. Is he Secretary of this Association?

A. He is Secretary.

Q. Is this contract now in force?

A. Yes.

Mr. Frohlich: I offer it in evidence. That is the same as the other contract.

(The document just offered was received in evidence and [fol. 801] marked Plaintiff's Exhibit No. 2, of this date.)

4 Mr. Frohlich: If you will stipulate that we can substitute a photostatic copy in place of the original, you can take my statement that it is a true and correct copy, subject to correction at all times.

Mr. Nye: That is agreeable.

Q. When did Irving Berlin, Inc. first join the American Society of Composers, Authors and Publishers, if you know?

A. I don't know.

Q. Who is the President of your company?

A. Irving Berlin.

Q. Who is Mr. Saul H. Bornstein?

A. He is Secretary and Treasurer.

Q. Is he in New York at the present time?

A. No.

Q. Where is he?

A. In Europe.

Q. How do you acquire your rights from the writers and composers of musical compositions?

A. By contract.

Q. Have you brought with you typical contracts made with an author or composer?

[fol. 802] A. I have.

Q. Will you produce it, please? (Paper produced by the witness.) You have produced this document from your files, dated September 27, 1934, purporting to be an agreement between Irving Berlin, Inc. and Truman Tomlin, Coy Poe and Jimmy Grier. Do you recognize the signatures to the contract (handing paper to the witness)?

A. Yes, I do.

Q. Are those the signatures of the gentlemen whose names I have just read?

A. Yes.

Q. Do you also recognize the signature of Mr. Bornstein at the foot of the contract?

A. Yes, I do.

Mr. Frohlich: I offer the paper in evidence.

Mr. Nye: Objected to as immaterial.

The Witness: Can we substitute a photostat copy of that?

Mr. Nye: There is no objection to the substitution of the copy, but it will be subject to the same objections as the original.

(The paper just offered in evidence was marked Plaintiffs' Exhibit No. 3, of this date.)

[fol. 803] Q. Mr. Schwartz, does Irving Berlin, Inc. enter into many contracts with authors and composers similar

or identical with the form that you have produced, which is now in evidence as Plaintiffs' Exhibit 3?

A. Yes.

Q. After you enter into a contract similar to Plaintiffs' Exhibit 3, do you arrange to publish the composition?

A. Yes.

Q. As a rule, when a contract of that kind is made and the composition placed with you, does the author or composer hand you a manuscript?

A. Yes.

Q. What do you do with that manuscript?

A. I have plates made of it and then have it printed, placed on sale and registered in Washington.

Q. At the time you register in Washington, you make a claim for the copyright of the composition?

A. Yes.

Q. And you receive from the Register of Copyrights a card saying that the composition has been registered for copyright?

A. Yes.

Q. And you thereafter sell the composition throughout the United States and elsewhere?

[fol. 804] A. Yes.

Q. When I say "this composition", I mean compositions that are published by you under these same conditions.

A. Yes, I know what you mean.

Q. Do you register musical compositions published by Irving Berlin, Inc. as unpublished works?

A. Yes, we do.

Q. Is that your invariable practice?

A. Yes.

Q. And when you register as an unpublished work, what do you send to Washington?

A. What we call a lead sheet.

Q. That is sent to Washington before publication?

A. Before publication, yes.

Q. After the composition is published, do you register again for copyright protection?

A. Yes.

Q. And this time you register as a published work?

A. Yes.

Q. Is that the practice adopted by your firm?

A. Yes, that is.

Q. Has that practice been followed by your firm for many years?

A. Yes.

[fol. 805] Q. Does your firm also publish musical compositions the copyright of which is owned by other publishers?

Mr. Nye: Objected to as immaterial.

A. We only publish after we have taken over from other publishers the copyright.

Q. Suppose some publisher wanted to transfer the right of publication to you, what is the practice in that respect?

Mr. Nye: I object to that; no foundation; hypothetical; immaterial.

A. He gives us a contract turning over the copyright to us and then we publish.

Q. Do you publish compositions in countries other than the United States?

Mr. Nye: I object to that as immaterial.

A. Not directly.

Q. How do you do it?

A. Through an agent.

Q. How do you publish compositions in England?

A. Through our agent.

Mr. Nye: Please note the same objection to all those questions.

Q. How do you publish compositions in France?

Mr. Nye: Same objection.

[fol. 806] A. Through an agent.

Q. Have you published many compositions since this firm has been in existence?

A. Yes.

Q. Can you tell us approximately about how many you published?

A. I think I have it here; about 125 to 150 a year average.

Q. Going back to 1919, is that right?

A. Yes.

Q. Are all of those compositions published by your firm since 1919 active compositions?

A. Most of them are.

Q. They are?

A. Yes, most of them are.

Q. And they are still being used and played, performed?

A. Yes.

Q. Does your firm publish compositions that are created and composed by Irving Berlin?

A. Yes.

Q. Who is Irving Berlin?

Mr. Nye: I object to that as immaterial.

A. A song writer, and President of our company.

Q. Has he written many compositions?

A. Yes, he has.

[fol. 807] Q. Have his compositions acquired popularity?

A. Great popularity.

Q. Has he written compositions that have appeared as production numbers in plays on the stage?

A. Yes, he has.

Q. Has he written compositions that have appeared in motion pictures?

A. Yes.

Q. Has your firm published the compositions so written and composed by him?

A. Yes.

Q. When an Irving Berlin number is written for a play or a motion picture, what is the practice of your firm with regard to registering the same for copyright as a published work?

Mr. Nye: I object to that as wholly immaterial.

A. The registration itself is the same as all other numbers.

Q. You mean that you register it as an unpublished work?

A. Yes.

Q. But do you withhold the publication of the composition for any considerable period while this number is being produced in a picture or stage play?

[fol. 808] A. Yes.

Q. Will you state the reason for withholding the publication of a composition under those conditions?

Mr. Nye: I object to that as immaterial.

A. Because in most cases the stage producer or motion picture producer asks that we hold it up and not exploit it until a certain time, until the release of the picture.

Q. What is the practical reason for withholding the release, if you know?

Mr. Nye: I object to the question as speculative, calling for a conclusion.

A. Until the release of the play or the picture.

Q. In other words, if you publish the composition while the play or picture were current, that might hurt the receipts of the exhibition of the picture or play?

Mr. Nye: I object to that as having been asked and answered.

A. No, not exactly; I mean that if we published a song prior to the time they tell us to that then we might hurt their play or picture.

Q. Do you license the mechanical reproduction of your musical compositions from time to time?

A. Yes, we do.

Q. What is the practice with regard to licensing these [fol. 809] compositions for mechanical recording purposes?

Mr. Nye: That is objected to as immaterial.

A. We license them by contract, and in some cases under the compulsory license law.

Q. What do you mean by the "compulsory license law"?

Mr. Nye: I object to that as incompetent.

A. That is in the copyright law of 1909; where we give one company the right to record a record, other companies may do the same thing by paying us the stipulated two cents royalty and notify Washington and ourselves that they are recording it; that is what we call the compulsory license law.

Q. Until you license your composition with one company, has any other company a right to make a recording of that number?

A. No.

Q. Do you have any definite practice with regard to the time when you issue licenses for the recording of your compositions?

A. Yes, on production numbers we do.

Q. When do you license the recording for mechanical reproduction of your production numbers?

Mr. Nye: I object to that as immaterial.

A. A certain time after the release of the play or picture, [fol. 810] and not before.

Q. Who collects the royalties from the mechanical recordation of these compositions?

A. We do.

Q. Who pays you the money?

Mr. Nye: I object to that on the ground that is immaterial.

A. The various mechanical companies.

Q. Out of the moneys collected by you from these mechanical companies, do you pay the author and composer?

A. Yes.

Mr. Nye: Just give me an objection to all those questions as to materiality.

Q. Is that money paid to the author and composer pursuant to your contract with him?

A. Yes.

Q. Do you in any of your contracts with authors or composers provide for public performance for profit of the composition?

Mr. Nye: I object to that as not the best evidence; Exhibit 3 being in evidence is probably the best evidence.

A. What is the question? (The pending question was read by the stenographer.) Yes.

[fol. 811] Q. Do you enter into any other contracts, other than Exhibit 3 in evidence, with any other writer or composer, under which you undertake to pay him for public performance for profit of any of his compositions?

A. No, we do not; we don't agree to pay for that.

Q. After a composition is produced as a mechanical record, do you in any way control or have any voice in the sale or disposition of that record?

Mr. Nye: I object to that as immaterial.

A. No.

Q. Did you ever license any producer or manufacturer of mechanical records or music rolls to publicly perform for profit any of the records of your compositions?

Mr. Nye: Objected to as immaterial.

A. No.

Q. Is there any contract between you and any producer or manufacturer of music rolls in existence under which you have the right to control the public performance for profit or the use for public performance for profit of any of your compositions or publications?

Mr. Nye: I object to that as immaterial.

A. No.

Q. So that if a manufacturer of a piano roll or disk record sold a record or roll in the State of Nebraska, is there [fol. 812] any way under which you could compel him to fix the price for public performance for profit of that composition?

Mr. Nye: I object to that on the ground that it is speculative, calling for a conclusion and immaterial, and calling for an interpretation of law.

A. No, because he has no rights to public performance.

Q. Is there any contract between your firm and any manufacturer of records or music rolls under which you have the right, on such record or music roll, to fix the price for public performance for profit of that record or roll?

Mr. Nye: I object to that on the ground that it calls for a conclusion, not the best evidence.

A. No.

Q. Your firm has published many popular pieces over the years, hasn't it?

A. Yes.

Q. Were Irving Berlin's musical compositions very popular?

A. Yes.

Q. Can you name some of the older compositions written ten or fifteen years ago, that were very popular?

Mr. Nye: Objected to as immaterial.

[fol. 813] A. Yes, I can.

Q. Will you name a few?

A. "Always"; "All Alone"; "Remember"; "Blue Skies"; those are all popular songs.

Q. Can you tell us how many copies of sheet music you

sold of these four or five compositions of Berlin that you have just named?

Mr. Nye: Objected to as immaterial.

A. Over a million of each.

Q. A million of each?

A. Yes.

Q. Has your firm published within recent years any popular compositions of Irving Berlin?

A. Yes, we have.

Q. Will you please name some?

A. One called "Me"; "How Deep Is The Ocean, How High Is the Sky"—that is all one song; "Butter Fingers".

Q. Did you publish "Top Hat"?

A. That is not a popular song. I am giving you popular songs, not productions.

Mr. Nye: Let me make an objection to that last question as immaterial.

Q. How many copies of the compositions you have just mentioned, did you sell?

[fol. 814] Mr. Nye: I object to that as immaterial.

A. From about thirty or forty thousand to a hundred and fifty thousand.

Q. Did you publish a composition named "Top Hat"?

A. "Top Hat, White Tie and Tails".

Q. Did you publish another composition in the picture, named "Picolino"?

A. We did.

Q. Do you classify those compositions as production numbers?

A. Yes.

Q. Were those numbers popular?

A. Yes.

Q. Did those pictures have a wide distribution?

Mr. Nye: Objected to as immaterial.

A. Yes.

Q. How many copies of sheet music did you sell of these last three?

Mr. Nye: That is objected to on the ground that it is immaterial.

A. There were a few other compositions in that same picture. I know about how much the whole score sold; I can't give you the individual compositions.

Q. Were these compositions published individually?

[fol. 815] A. Yes.

Q. Can you tell us how many copies of these individual compositions were sold?

A. No. I could get it.

Q. Does your firm publish compositions from other sources?

A. Yes.

Q. Besides Irving Berlin?

Mr. Nye: Objected to as immaterial.

A. Yes.

Q. Many others?

A. Yes.

Q. Have you published the compositions of these other writers and composers during these years?

A. Yes.

Q. And were many of those compositions what you would call "hit numbers"?

A. Yes.

Q. By a hit number, what do you mean?

A. In demand.

Q. Is a hit number a number that is played by the users of music throughout the country?

A. Yes, a great deal.

Q. Played over the radio?

[fol. 816] A. Yes.

Q. Played at dance halls?

A. Yes.

Q. Hotels?

A. At hotels.

Q. In the old days—I am going back twelve or fifteen years—was it the usual thing to sell a million copies of music of a hit number?

Mr. Nye: Objected to as immaterial.

A. Yes.

Q. Do you recall when radio became a popular means of entertainment?

A. About 1929 I think it was, or 1930, it first started.

Q. Did you notice any falling off in the sale of sheet music after 1929?

Mr. Nye: Objected to as immaterial.

A. Yes, at least eighty per cent.

Q. Did you notice any falling off in the manufacture and sale of piano rolls and mechanical records since 1929?

A. Yes, about ninety-seven per cent.

Mr. Nye: Why can't it be agreed that we make an objection as to the materiality of all this stuff right through, except as to the individual exceptions as to which it stands; [fol. 817] in other words, I want to get away from the word "immaterial" for each question.

Mr. Finkelstein: You can note on the record that the counsel for the defendants has a standing objection as to the materiality of each of the questions asked.

Mr. Frohlich: That is all right.

Mr. Nye: In addition to any more specific objection that is made to any individual question.

Q. Are you acquainted with other publishers?

A. Yes.

Q. Do you know many writers of music and composers?

A. Yes.

Q. Do you know something about the publishing business generally?

A. Yes, I do.

Q. And you know some of the problems that they have?

A. Yes.

Q. Some of the troubles that they have had?

A. Yes.

Q. Do you know whether other publishers have had a marked falling off in the sale of sheet music and mechanical records and piano rolls since 1929?

Mr. Nye: Same objection; not the best evidence.

[fol. 818] A. Yes, every publisher.

Q. In the old days when you published a song, prior to 1929, how long was the life of a song, generally speaking?

A. Between six and eight months.

Q. Was that the life of a hit song?

A. Yes.

Q. When you publish a hit song now, what is the average life of it?

A. Four to six weeks.

Q. When you publish a hit song now is it played extensively on the radio?

A. Yes.

Q. Is it played every night and every day?

A. Yes.

Q. And has this constant repetition of playing the song over the radio anything to do with the life of the song, in your opinion?

A. Yes, it has.

Q. What is the result of this constant repetition?

Mr. Nye: Objected to as calling for a conclusion; no foundation.

Mr. Frohlich: I think he has qualified as an expert.

Mr. Nye: We will let the Court say.

[fol. 819] Q. What is the result?

A. It shortens the life of a song and kills it very quickly.

Q. Now, you have a catalogue compiled of the compositions published by your firm, have you not?

A. Yes.

Q. Does that catalogue involve an investment of money?

A. Yes.

Q. Can you give us an approximate idea of how much money your firm has invested in the publication of songs since 1919?

Mr. Nye: Objected to as immaterial.

A. I can't even give it to you approximately, because it involves a great deal of money and I would have to look it up.

Q. Has Irving Berlin, Inc. spent any moneys for advertising?

A. Yes.

Q. What did you spend for advertising in 1936?

A. If you mean by advertising just advertising in trade papers, that is a different matter, because I consider advertising the overhead, what we spend to have the songs done on the air and in other places.

Q. Do you include in that word "advertising" the many expenses of popularizing and plugging the songs?

[fol. 820] A. Yes.

Q. Can you give us approximately what you spent on your compositions in 1936?

A. About an average of thirty or forty thousand dollars every month.

Q. How much in 1937?

A. About the same.

Q. Would you say \$30,000 was an average price?

A. An average price?

Q. Or an average amount expended?

A. Average amount expended.

Q. Now, with respect to works that were published prior to 1909, has Irving Berlin, Inc. published any such works?

A. We started in business in 1919.

Q. Have you in the catalogue any works that were published prior to the time you started in business?

A. No.

Q. Do you own any copyrights that were obtained prior to 1909?

A. No, we do not.

Q. Would you be able, acting alone and not in combination with any other publisher, composer or author, to determine and fix the price to be charged for the use or rendition of any of your copyrighted musical compositions within the State of Nebraska?

Mr. Nye: That is objected to on the ground that it calls for a conclusion, no foundation laid, and also speculative.

A. No.

Q. If you were to determine and fix the price to be charged for the use or rendition of any of your copyrighted musical compositions within the State of Nebraska, tell us, please, what factors or elements you would have to take into consideration in fixing such a price.

Mr. Nye: Same objection as to the last question.

A. There would be quite a few factors to be taken into consideration. First, the song itself; second, what part of the song is being played; whether it is played instrumentally or sung; whether the whole song is played and sung or only part of it; where it is being done; whether on the radio; what sort of a station; is it a big station or a small station; where the dance hall is; what is the size of that dance hall, how many people they could accommodate; each dance hall would have to be figured separately; every movie house would have to be figured separately, how many seats they have and the size of the town and where they are and what

[fol. 822] their income is. There are a great many other factors I can't remember off hand that would have to be taken into consideration.

Q. Assuming that there are 367 users of copyrighted music in the State of Nebraska, would you, in order to determine and fix the price to be charged for the use or rendition of any of your musical compositions within that State, have to make inquiry as to each one of the 367 establishments?

Mr. Nye: Please note the same objection, and also that it is leading; and also assuming that the Nebraska statute or law requires a publisher or composer to do that; it is just the opposite; it seeks to avoid all those difficulties.

A. Yes, I would.

Q. In order to make inquiry into the extent and nature of the use and of the price to be fixed for such use within the State of Nebraska, would you have to have some representative in that State?

Mr. Nye: I object to it on the ground that it calls for a conclusion and speculation; no foundation.

A. Yes.

[fol. 823] Q. Would that involve you in any expense?

Mr. Nye: Same objection.

A. Yes, a very large expense.

Q. Would you be compelled to employ somebody in the State of Nebraska to keep an eye on these establishments for the purpose of detecting infringements of your compositions?

Mr. Nye: Same objection.

A. Yes.

Q. Would you be compelled to employ a lawyer in the State of Nebraska for the purpose of bringing suits against these users for infringement?

Mr. Nye: Same objection.

A. Yes.

Q. Can you tell us what is a fair estimate of the expense you would be put to in ascertaining these establishments, their nature and extent, in hiring somebody to detect in-

fringements, and in bringing suits to protect you from infringements?

Mr. Nye: Same objection.

A. I can't give you a stated amount, not having experience, but I imagine it would be at least, for a firm like ours, \$25,000 or more a year.

Mr. Nye: I move to strike out all of the words after the [fol. 824] words, "but I imagine"; not a statement of fact nor the expression of an opinion.

Q. Perhaps I can narrow this down to something that we won't have to guess on. If you hired somebody in the State of Nebraska to ascertain the nature and extent of the establishments and the use of your copyrighted musical compositions, what would that necessitate?

Mr. Nye: Objected to, as having been asked and answered, and also calling for a conclusion.

A. It would necessitate hiring an attorney, and a man to go around on that investigation.

Q. Would you have to pay their expenses?

Mr. Nye: Same objection.

A. Their expenses, their railroad fare and salaries.

Q. You would have to pay their salaries?

A. Yes.

Q. Would these men have to be skilled in music?

Mr. Nye: Same objection.

A. They would have to be, in order to recognize the songs that were being played.

Q. What salary would you have to pay to such an investigator?

Mr. Nye: Objected to as calling for speculation and conclusion. [fol. 825]

A. About \$75 a week, plus expenses.

Q. What would you have to pay a lawyer down there to bring suits for you?

Mr. Nye: That is objected to as calling for speculation; and no foundation.

A. I don't know what lawyers charge in Nebraska.

Q. In other words, you would have to establish an agency of your own in Nebraska to protect your compositions against infringement?

A. Yes, we would. I would like to qualify that by not saying an agency; an agency in every city in the State.

Q. In every city in the State?

A. Large, and small ones too.

Q. What is your estimate of the expense involved in maintaining such an agency?

Mr. Nye: Same objection.

A. At least \$25,000 a year.

Q. Now, taking all the compositions that you have heretofore published, if you determined and fixed the price to be charged for the public performance for profit of these compositions and stamped that price upon each composition sold by you in the State of Nebraska, would you be under any obligation to pay any of your writers any part of the [fol. 826] sum collected for such public performance for profit?

Mr. Nye: Same objection; calling for a conclusion.

A. Do you mean, if we did it and not the American Society of Composers, Authors and Publishers?

Q. If there were no American Society and you were acting alone and independently, would you be required to pay your writers anything that you received by way of public performance for profit within the State of Nebraska?

A. Yes, we would.

Q. Would you be required to make that payment under any contract with them?

A. Yes.

Q. Is there any contract in existence between you and the writers for public performance for profit of these compositions?

Mr. Nye: I object to that question as calling for a conclusion and tending to vary the terms of Exhibit 3.

A. No.

Q. Would the writers' compensation on these compositions published by you over the years be determined by the contracts between the writers or composers and your firm?

Mr. Nye: Objected to as calling for a conclusion.

[fol. 827] A. Yes, they would.

Q. Can you fix the price to be received by you on your compositions published in the State of Nebraska for the mechanical recordation of your compositions?

Mr. Nye: Objected to as calling for a conclusion.

A. That is a hard question to answer, because according to the law if one company makes it in New York State another company can make it in Nebraska if that company complied with the copyright law.

Q. Do you recognize that under the statute of Nebraska you would be required, immediately upon publication of your composition within the State of Nebraska, to fix the price for all uses and purposes within the State of Nebraska?

A. Yes.

Q. Assuming that when you sell a composition within the State of Nebraska you can for all uses and purposes determine and fix the price for all that that composition would be used for, assuming that state of facts, could you or would you want to fix and determine the price for the mechanical recordation of your composition at the time you sell your composition in Nebraska?

Mr. Nye: I object to that as calling for speculation, calling [fol. 828] for a conclusion, and for the reason that it is a double question, and argumentative.

A. No.

Q. Is it to your business advantage to withhold giving the license for mechanical recordation of your composition until after the publication of a composition?

A. No, it is not.

Q. Do any of the manufacturers of records or piano rolls ever receive from you a license to publicly perform for profit the composition?

A. No.

Q. Are these records made from your composition manufactured in various parts of the United States?

A. Yes.

Q. Have you any control over the place where they are sent or sold or delivered?

A. No.

Q. Is that entirely within the province of the manufacturer of the record?

A. Yes.

Q. Are they sent from outside of the State of Nebraska into the State of Nebraska?

A. Yes.

[fol. 829] Q. Have your compositions been played within the State of Nebraska?

A. Yes.

Q. Have you any measure of control over the sale of these records in the State of Nebraska?

A. No.

Q. Have you any contract with any of these manufacturers of records under which you can compel them to fix a price on each of those records for the public performance for profit of those records?

A. No.

Q. Are you willing to allow the manufacturers of records and piano rolls to have that right?

Mr. Nye: Objected to as calling for a conclusion; speculation.

A. No.

Q. Are you willing to allow any of these manufacturers of records or rolls to act as your agents for the purpose of collecting fees for public performance for profit of these positions in the State of Nebraska?

A. No, we are not.

Q. Have any of your compositions ever been played on hook-ups on the radio?

Mr. Nye: I object to that; no foundation laid.

[fol. 830] A. Yes.

Q. Have you any familiarity with radio?

A. A little.

Q. Do you know whether there is such a thing as a national hook-up?

Mr. Nye: Objected to as calling for a conclusion.

A. Yes.

Q. Do you know that the National Broadcasting Company has a system of national hook-up?

Mr. Nye: Objected to as calling for a conclusion; no foundation.

A. Yes.

Q. Do you know whether the National Broadcasting Company has such a national hook-up system?

Mr. Nye: Same objection.

A. Yes.

Q. Are your compositions frequently played in the New York stations of the National Broadcasting Company and sent by hook-up to various other stations in the United States including Nebraska?

Mr. Nye: Same objection.

A. Yes, they are.

Q. Have you sold your sheet music over the years to [fol. 831] various dealers of sheet music in the State of Nebraska?

A. Yes.

Q. When these dealers purchase musical compositions from you, when they purchase this sheet music, is it their property?

A. Yes.

Q. Have you any control over the manner in which they sell this sheet music?

A. No.

Q. Can you compel them in any way to put any price on that sheet music, including the price for public performance for profit?

A. Except public performance for profit, they have no right to that.

Q. Have you any right to put on the composition that they sell, a price for the public performance for profit?

Mr. Nye: I object to that as calling for a conclusion of law.

A. No.

Q. Have you sold a substantial number of your compositions in the last few years to dealers in Nebraska?

A. Yes.

Q. Have you any agent or representative of your own in that State?

[fol. 832] A. No.

Q. Do you transact any business within that State?

A. Yes, we sell sheet music there.

Q. You sell sheet music to jobbers?

A. To dealers.

Q. Where is the music shipped from?

A. New York.

Q. Have you any office of your own out there in Nebraska?

A. No, we have not. I want to qualify that other statement, that besides ours there are plenty of dealers in Nebraska who buy from jobbers.

Q. Are copies of practically all of your copyrighted compositions now owned by dealers in Nebraska?

Mr. Nye: I object to that; no proper foundation laid for knowledge of the witness.

A. Most of them are, yes.

Q. You as general manager of Irving Berlin, Inc. have some knowledge of the business done by your company?

A. Yes, I have.

Q. Do you know of your own knowledge whether or not copies of your compositions are sold to dealers or jobbers in the State of Nebraska?

A. To dealers.

[fol. 833] Q. Could anyone walk into a store in Nebraska and buy one of your compositions?

A. Yes.

Q. I show you this document and ask you whether you recognize the signatures at the foot of it (handing paper to the witness).

A. Yes, I do.

Q. Whose signatures are they?

A. S. H. Bornstein, Treasurer of our company, Ned E. Depinet, President of R. K. O. and Morton E. Young, Assistant Secretary of R. K. O.

Q. Is that contract now in force and effect?

A. Yes.

Mr. Frohlich: I will offer it in evidence.

(The paper just offered in evidence was marked Plaintiffs' Exhibit No. 4, of this date.)

Mr. Frohlich: Will it be all right to put in a photostat copy in place of the original to be used with the same force and effect as the original?

Mr. Nye: That is all right. We object to it as immaterial.

Q. Is this contract, Exhibit 4, still in force and effect?
[fol. 834] A. Yes.

Q. Did it expire by limitation of time?
A. Yes.

Mr. Nye: I move to strike out Exhibit 4.

Q. Under this contract did R. K. O. synchronize the musical compositions of your firm in its pictures?

Mr. Nye: I object to that as immaterial and incompetent.

A. Yes.

Q. Your firm published the musical compositions that were so shown and synchronized in the picture, is that right?

A. Yes.

Q. Can you name some of the pictures that were the subject of this contract?

A. May I refer to the catalogue?

Q. Certainly.

A. (Examining catalogue) The picture called, "Down To Their Last Yacht," "Strictly Dynamite," "Kentucky Colonels", "Stingaree", "Hurray For Love". Do you want any more?

Q. That will be sufficient. Can you recall any musical compositions which were published by you which appear in the pictures just mentioned?

A. I will call them off for you.

[fol. 835] Q. Just pick out a few of those compositions (handing catalogue to the witness).

A. Do you want one of each?

Q. One of each will do.

A. "There's Nothing Else To Do In Malakamokolu," "One Little Kiss," "I Went Hunting And The Big Bad Wolf Was Dead," "Night Is Mine", "You're An Angel".

Q. Under this contract, Plaintiff's Exhibit 4, has R. K. O. the right to use the compositions mentioned by you in their pictures for the balance of the term of copyright of each of the compositions?

A. Yes, they have.

Q. Are these copyrights of the compositions you have just mentioned still subsisting?

A. Yes.

Q. Can you tell us when they were copyrighted, how many years ago approximately?

A. You can see it in there; it gives you the year.

Q. You have produced this document in a red cover, entitled, "Catalogue of Copyrighted Musical Works, Irving Berlin, Inc." Is that a list of the copyrighted publications of Irving Berlin, Inc.?

A. Yes; there is a supplement attached to that.

Q. It is all in one volume?

[fol. 836] A. Yes.

Mr. Frohlich: I will offer it in evidence together with the supplement.

Mr. Nye: We object to it as immaterial.

(The catalogue just offered in evidence was marked Plaintiffs' Exhibit No. 5; the supplement to the catalogue was marked Plaintiffs' Exhibit No. 5-A, of this date.)

Q. What did Irving Berlin, Inc. receive from the American Society of Composers, Authors and Publishers by way of royalties for the year 1936?

A. I don't remember the exact amount.

Q. Give us the approximate amount.

A. It was over \$100,000.

Q. What did it receive for 1937?

A. Also over \$100,000.

Q. What did it receive for 1935?

A. I don't remember; it was around the same figure, but I don't remember.

Q. What do you consider the value of this contract, exhibit 2; what do you consider the value of that contract to your firm?

Mr. Nye: I object to that as immaterial and speculative.

[fol. 837] A. I consider it is the life of the firm.

Q. What do you consider that value in dollars and cents?

A. That is hard to judge—passing on an income of over \$100,000 a year. I know that without that contract we would be out of business.

Mr. Nye: I move to strike out all of the answer except "That is hard to judge", as not responsive.

Q. Can you give us an estimate of the value, based on the amount of money you have received from the Society and the balance of the contract period?

Mr. Nye: I object to that as purely speculative, no foundation laid.

A. I would say over a million dollars.

Q. Assuming that you were not a member of the American Society of Composers, Authors and Publishers, could you, at the time of publication of your compositions, immediately determine and fix the price for the public performance for profit of such composition?

Mr. Nye: I object to that as calling for a conclusion, speculative, having been asked and answered.

[fol. 838] A. No.

Q. Will you tell us what is the practice of your firm in launching a song, with respect to the advertising publicity popularizing it and so forth?

Mr. Nye: I object to that as having been asked and answered.

A. I employ men in various cities throughout the country to get our songs played and sung over the radio, in dance halls and any other place where music is played or sung.

Q. Does the time vary in which you are able to popularize a composition?

A. Yes.

Q. Are some songs popularized in a short time?

A. Yes.

Q. Are some songs never popularized?

A. Yes.

Q. And with respect to some songs, does it take a long time to popularize them?

A. Yes.

Q. In determining and fixing the price to be charged for the use or rendition of your copyrighted composition in the State of Nebraska, would you have to take into consideration the length of time which you would have to have to popularize your composition?

[fol. 839] Mr. Nye: Objected to as calling for a conclusion.

A. Yes.

Q. Could that be done immediately upon the publication of the work?

Mr. Nye: Same objection.

A. No.

Q. In popularizing a song, please give us the various steps that you take in making a song popular.

Mr. Nye: Objected to as having been asked and answered.

A. Every branch office that we have, New York and otherwise, have to take the orchestrations, the professional copies, the vocal, and go to each band and singer and keep after him or her until they do the song.

Q. Do you have to pay any advance royalties to the author or composer?

A. Sometimes; not in every case.

Q. Does your firm publish compositions that appear in productions on the stage?

A. Do you mean, do we publish it now, or have we published it?

Q. Have you published them in the past?

A. Yes, we have.

[fol. 840] Q. Can you give us the names of some?

A. "Ziegfeld Follies," "Music Box Revue," "As Thousands Cheer".

Q. With respect to these production numbers, are the rights frequently separated?

A. I don't understand that question.

Q. Well, let us take it piecemeal. These numbers have grand performing rights as well as small performing rights?

A. Yes.

Q. And by the grand rights you mean the rights on the stage?

A. That is right.

Q. And when you have for publication a musical composition which is interpolated or is a part of a stage production, does your firm possess or own such rights?

A. No, we do not.

Q. Are the stage rights usually held by somebody else outside of the firm?

A. Yes.

Q. Do you know anything about the capital investment that is made in producing a stage play in which your compositions appear?

Mr. Nye: I object to that as purely speculative.

[fol. 841] A. No, I don't know.

Q. Where your firm has published musical compositions which appeared on the stage, has your firm any practice with respect to restricting those numbers?

A. Yes; they are always restricted.

Q. That is to say, you restrict the public performance for profit of those numbers throughout the country, is that correct?

A. Yes.

Q. You do that by notifying the Society to that effect?

A. Yes, we do.

Q. What is the object of that?

Mr. Nye: I object to that as calling for speculation.

A. So that we can regulate it so that it doesn't hurt the play.

Q. In other words, you don't want the public performance for profit, the small rights, to interfere with the production of the play during its run; isn't that what you have in mind when you restrict these numbers?

A. Yes.

Q. You don't want to have any competition between these two?

[fol. 842] A. That is right.

Q. Would you be able to restrict the compositions published by you which appear in these stage plays, under the statute which provides that you must immediately upon publication of the work determine and fix the price to be charged for the use or rendition of your copyrighted musical compositions for public performance for profit within the State of Nebraska?

Mr. Nye: I object to that as calling for a conclusion.

A. I don't know the Nebraska law, but I certainly could not fix a price on a composition the minute it is published.

Q. Would any producer put on a play if you were unable to restrict the compositions in that play?

Mr. Nye: Objected to as calling for a conclusion.

A. The producer may put on the play, but he certainly wouldn't give any publisher the right to publish the song.

Q. So that under those circumstances would that interfere with the publication of the musical composition by your firm?

A. Yes, it would.

Q. In what way would it interfere with the publication of the composition?

[fol. 843] A. If we couldn't restrict it we couldn't get the publication.

Q. Is the publication of musical compositions that appear in plays a substantial part of your business?

A. Yes, it was.

Q. Was there a time when Irving Berlin wrote many plays?

A. Yes.

Q. Did your firm have the publication rights of the compositions that appeared in those plays?

A. Yes.

Q. Did your firm also have the publication rights in other compositions in plays written by others, in the past?

A. Yes.

Q. Was the publication of these compositions of great value to your firm?

A. Yes.

Q. You derived substantial moneys from them?

A. Yes.

Q. In all cases where these compositions appeared in stage plays, did you restrict the different compositions?

A. Yes, we did.

Q. At that time you didn't permit any radio company or any hotel or dance hall to perform these compositions?
[fol. 844] A. No.

Mr. Nye: I object to that as leading. Counsel is testifying instead of the witness. I move to strike out the last five questions and answers for the same reason.

Q. Are you willing to have your contract, Exhibit 2, with the American Society of Composers, Authors and Publishers declared void and illegal?

Mr. Nye: I object to that as calling for a conclusion.

A. No, we would not.

Mr. Frohlich: Your witness.

Cross-examination.

By Mr. Hotz:

Q. Mr. Schwartz, calling your attention to Exhibit 3, which is the contract between yourselves and Truman Tomlin, Coy Poe and Jimmy Grier, I note a clause therein under paragraph four which reads as follows: "Any and all receipts of the publisher from any other source or right now

known or which may hereafter come into existence". Now, that clause I presume is operative, is it not?

A. Yes.

Q. In all of your contracts with composers and authors?

A. Yes.

[fol. 845] Q. That calls for a division of an amount equal to thirty-three and one-third per cent of all of the receipts of the publisher with respect to the licenses and then these other things which are covered by the clause that I have read to you; is that right?

A. Yes.

Q. Now, you, of course, are a member of the American Society of Composers, Authors and Publishers?

A. Yes.

Q. And have been for many years?

A. Yes.

Q. And I presume that you are more or less acquainted with all of the publishers of copyrighted musical compositions in this country?

A. Not all of them, no.

Q. Well, you know who the publisher members are of ASCAP, I presume?

A. I don't know the whole list; I know those I come in contact with in New York.

Q. Do the publisher members of ASCAP, would you say that they constitute a very substantial part of the reputable publishing houses in the country?

A. Yes.

Q. Do you know of any large publishing house that [fol. 846] is not a member of ASCAP?

A. I don't know of any.

Q. You know of none?

A. No.

Q. In Exhibit 5, that is a list of the copyrighted musical works of your organization?

A. Yes.

Q. And it contains about how many would you say in number?

A. I don't know; I never counted them.

Q. Five thousand?

A. I don't know.

Q. Does your firm own the copyrights as your own on some music where you do not—that you bought outright and you don't have to deal with the composer?

A. We own the copyrights on everything.

Q. What I am driving at here—are there pieces in your catalogue on which you do not have to pay the author and composer any portion of the money, by way of royalties, that you collect?

A. I don't know whether there are any.

Q. You know of none then that are owned?

A. I don't recall any offhand.

Q. In each instance there is a division made of profits [fol. 847] on copyrighted music and you make that division with somebody in each instance, of the income?

A. We pay a royalty in accordance with that contract, a royalty, of what we receive.

Q. Are all of the persons that you deal with, all of the persons, that is, composers and authors with whom you have contracts similar to Exhibit 3, members of ASCAP?

A. There are times when the author or composer has not become a member of ASCAP at that time and we would take a song from him just the same, and we have taken them.

Q. Who fixes the price that is to be paid for public performance for profit of the musical compositions upon which you own or control the copyrights?

A. American Society of Composers, Authors and Publishers.

Q. Now, as a matter of fact, your organization actually owns the copyrights, do you not?

A. Yes.

Q. Otherwise you wouldn't publish the music. That is one of the conditions and requirements that your house has in dealing with authors and composers?

A. Yes.

Q. Is that generally the arrangement that publishers have?

Mr. Finkelstein: That is objected to; no foundation [fol. 848] laid.

A. I wouldn't know that.

Q. Now, the non-members, that is, persons that are not members of the American Society of Composers, Authors and Publishers, you pay them nothing for public performance rights, do you?

Mr. Finkelstein: The contract speaks for itself.

A. No.

Q. Do you pay any of the persons such as those whose names appear on Exhibit 3, anything for their public performance rights?

A. No, because they get it from the American Society.

Q. Now, the income from the public performance rights is divided equally, I understand, between the publisher members and the composers and authors, is that right?

A. Yes.

Q. That is, the profits are divided equally?

A. I don't know whether they are profits; I don't know that the American Society makes any profits.

Q. That is, the income, the money which they collect is divided equally between the composers on the one side—

A. And the publishers.

Q.—and the publishers on the other? Who made that [fol. 849] arrangement?

A. The American Society.

Q. Do you have anything to do, your Irving Berlin Company, with fixing licenses for public performances, that is, the amount that a hotel shall pay or a radio station shall pay?

A. No.

Q. Who does that work? You say the American Society of Composers, Authors and Publishers, but who in that organization does that work?

A. I don't know.

Q. Would you say Mr. Buck and Mr. Mills and Mr. Paine?

A. Whatever I would say would be a guess. I don't go to their meetings or anything like that.

Q. Have you ever attended any meetings of ASCAP?

A. No.

Q. Has anyone from your firm?

A. Yes.

Q. Who does?

A. S. H. Bornstein, our Treasurer.

Q. He usually goes?

A. Yes.

Q. Is he on the board of directors?

A. Yes.

[fol. 850] Q. Of ASCAP?

A. Yes.

Q. Any other members of your firm on the board of directors of ASCAP?

A. No.

Q. How long has Bornstein been on that board of directors?

A. I don't know, but I know it is over ten years.

Q. A long time?

A. Yes.

Q. Irving Berlin is one of the members of the Authors and Composers, also?

A. Yes.

Q. As well as of Irving Berlin, Inc.?

A. Yes.

Mr. Nye: Make that a member of the board of directors of American Society of Composers, Authors and Publishers.

Mr. Frohlich: No, not Irving Berlin.

Q. Do you know what Mr. Irving Berlin gets from the American Society of Composers, Authors and Publishers?

A. No, I don't know.

Q. That is not handled through the books of your firm?

A. No.

[fol. 851] Q. But he does receive a fixed sum of money from them?

A. Yes.

Q. Because of the ~~fact that~~ he is a composer and writer?

A. Yes.

Q. You have never read the Nebraska law, I don't suppose, on this subject?

A. No.

Q. What does your firm sell by way of its product; just the names of a number of things; sheet music, that is one thing.

A. Orchestrations.

Q. Orchestrations and what else?

A. The right to make phonograph records.

Q. That is a right which you give to manufacturers?

A. That is right.

Q. That is, you get up a phonograph or a record of that type and then you are paid a certain sum of money by arrangement that you make with the manufacturer?

A. That is right.

Q. And that is all the interest you have in that matter?

The manufacturer then manufactures and promotes the sale? You don't sell those records?

A. No.

[fol. 852] Q. The only thing you sell, then, is written or printed matter?

A. We give them a license to record the record for sale.

Q. But you don't sell the record, that is the point?

A. No, we don't sell the record.

Q. What arrangement do you have with him, that is, the manufacturer, for paying you for that right; what arrangement do you have with him?

A. We have some people that pay us quarterly; other people pay us monthly.

Q. It is a fixed sum that they pay you?

A. No, they pay us so much per record.

Q. That they sell?

A. That they manufacture.

Q. Whether they sell them or not?

A. Yes, that is right.

Q. Now, of the \$100,000 that you got last year from the American Society of Composers, Authors and Publishers, did you pay any of that sum to the three men, or any of the three, that are on Exhibit 3, that is, Truman Tomlin, Coy Poe or Jimmy Grier?

A. No, because they get their share from the American Society of Composers, Authors and Publishers.

Q. That is true in each instance as to all composers and [fol. 853] and authors?

A. Yes, composers and authors.

Q. According to the record here which I have, published by the American Society of Composers, Authors and Publishers, dated August 1, 1937, the first two on the contract, Truman Tomlin and Coy Poe, do not appear as members of the Society. I am calling your attention to that fact because you stated that the three got something from the American Society of Composers, Authors and Publishers. You wouldn't pay them a part of the public performance rights if they were not members, would you?

A. We wouldn't know if they were members or not.

Q. But you make no payments; no part of that \$100,000 that you got from ASCAP was distributed to anybody but your own firm?

A. That is correct.

Mr. Frohlich: Do you want to clarify that answer?

The Witness: Even if we wanted to pay them we couldn't, because we wouldn't know whether it was five cents or a dollar or a thousand dollars aggregated for this song.

Q. You know, do you not, that ASCAP, the American Society of Composers, Authors and Publishers, in their [fol. 854] literature, said that they have complete and exclusive authority to license for public performance for profit?

A. Yes.

Q. And that they have the exclusive right to do so for your publications?

A. Yes.

Q. Is that a misstatement of fact on behalf of ASCAP or not?

A. What is?

Q. That they have the exclusive right to license and collect for public performance rights of your compositions?

A. No; they have.

Q. They do have that right?

A. Yes.

Q. And they do have the exclusive right?

A. Yes.

Q. And that is true so far as you know with all other publisher members?

A. So far as I know, yes.

Q. You are familiar, are you not, with the copyright law in connection with the construction of mechanical records?

Mr. Frohlich: I object to that, on the ground that the witness has not shown that he is qualified and he has not [fol. 855] shown that he is a lawyer, and there is no foundation for the question.

A. I am not familiar with the copyright law as I never studied it.

Q. In the State of Nebraska—the reason I am putting these questions to you is because your counsel asked you if you could operate in a certain way in Nebraska as required by the law of Nebraska, and you said “No,” and your counsel was directing to you questions largely in connection with mechanical devices, and I merely wanted to call your attention to certain parts of the copyright act which covers that subject, as I view it. But now, out in

Nebraska, all that you have got to sell is copyrighted musical compositions, isn't that right?

Mr. Finkelstein: I object that the term "musical composition" has not been defined by counsel. The question is vague, indefinite, impossible to understand.

Q. These musical compositions——?

A. Directly by us?

Q. Yes.

A. Sheet music and orchestrations.

Q. And they are printed on paper, are they not?

A. Yes.

[fol. 856] Q. And you have certain things printed on that paper?

A. Yes.

Q. Among other things, you probably have on there, "All rights reserved, including the rights of public performance for profit"?

A. I don't remember whether we have that or not.

Mr. Finkelstein: I object to the question. The publications speak for themselves.

Q. You also put in your catalogue here, Exhibit 5, that anybody interested in public performance for profit apply to the American Society of Composers, Authors and Publishers. It would be a simple matter, would it not, at the time you sold music in the State of Nebraska, to determine, if you wished to do so, and the composer, what price you would want to get for your music for all purposes, if you wanted to?

A. Not a simple matter.

Q. You could arrange with the composer and your own firm, the publisher, to determine the rights, if you wished to do so?

A. I stated before that in order to do that we would have to get a lot of information to decide what price it should pay.

Q. That same information has to be obtained in any case [fol. 857] because the public performance rights are being collected by ASCAP?

A. But that same information would have to be obtained for each individual song, because two songs are not alike.

Q. Of course, two songs are not alike, but the point I am trying to get at is, you could do it if you wished?

A. I could do it if I did it that way; if I could go to Nebraska or have somebody else do it, to get the information that I testified to before, and then let me have that information in New York, I would then sit down and put a price on that particular song.

Q. And ASCAP sends out a questionnaire to the various users which gives all or substantially all of the answers to the problems that you have brought out here. You have seen those, have you not?

Mr. Finkelstein: I object to that.

A. No, I have not.

Q. The point that I am getting at is that ASCAP gets that information and it fixes the public performance rights by obtaining information such as you have related here. And if you had that information, if Irving Berlin had that information, by arrangement between the author and composer and yourself you could stamp that piece of music and fix a price that would include public performance for [fol. 858] profit?

A. If we had all the information we need.

Q. And it could be done on just such pieces of music as you sold in the State of Nebraska?

A. No, it could not.

Q. Why not?

A. Because there are plenty of songs that go through the stations in Nebraska that go through from New York and from every big city in the United States, through a general hook-up.

Q. You are speaking now of radio?

A. Yes.

Q. I am speaking now of selling sheet music, musical compositions in the State of Nebraska.

A. Yes, just sheet music.

Q. There are three ways, are there not, in which music is presented to the public; one is through the sheet music, and the other is over the radio, and the other is through mechanical devices?

A. And through sources like dance halls.

Q. I mean instrumentally. It gets into being through those three things; either the music is taken and played by some individual or they hear it over the radio—

Mr. Finkelstein: I object to that line of questioning.

[fol. 859] Q. (Continued) —or by mechanical device?

A. Or through a motion picture.

Q. That would be a mechanical device.

Mr. Finkelstein: Or public performance for profit, then I will withdraw my objection.

Q. In each of these instances, whether by radio or mechanical device, it still has its origin through the sheet music to begin with?

Mr. Finkelstein: I object to the question, improper, incompetent, irrelevant and immaterial; assumes a state of facts that do not exist. There is no evidence in the record of it.

Q. Does it not?

A. Read the question again. (The pending question was read by the stenographer.) If you mean that the sheet music is written by the author first, yes.

Q. Yes, that is right. The author first sits down and makes his score with a pencil or pen and writes it up and then it is made up and printed and published by you?

A. That is right.

Q. And from that everything else arises, your mechanical and radio, singing and playing and everything else?

A. Yes.

Q. And you still could fix on the sheet music whatever [fol. 860] rights and privileges or restrictions you and the composer wished; that would be within your power and the power of your author and composer?

A. I don't quite understand that.

Q. I will put it this way. There would be nothing to prevent the publisher and composer getting together at the time that the music was put out and making whatever restrictions to its use they desired?

Mr. Finkelstein: I object on the ground that the question is hypothetical, assumes a state of facts not in evidence; it is a legal argument.

A. I don't know whether the copyright law would allow it or not.

Q. You could put on your sheet music, could you not, that anyone who came into possession of that piece of music could use it for the purpose, say, of electrical transcription?

A. We could print that on there.

Q. If you wished?

A. Yes.

Q. Now, about this falling off of sheet music sales. You talked about a million pieces of some years ago and that do not come now. What about the present day? Don't you have a larger number of songs; doesn't it require a [fol. 861] larger number of songs than it did before; doesn't that follow?

A. No, the only reason we require a larger number of songs is because the songs are killed so fast that we have to put up more material.

Q. More songs?

A. Yes, in order to exist.

Q. Would you say that your volume of business is off proportionately?

A. Our volume of business, taking all the additional songs into consideration, is the same percentage off from sales as I have testified previously.

Q. In other words, your business is just eighty per cent of what it was some years ago?

A. Yes, that is right.

Q. Has that been made up in any other manner?

A. Yes.

Q. How?

A. We get more from the American Society than we did before.

Q. This \$100,000 that you get?

A. Yes; if we didn't we would be out of business.

Q. And that comes from your public performance rights?

A. Yes.

Q. Are you also paid something from the motion picture [fol. 862] people?

A. No.

Q. For recording?

A. No. That is a custom of the business.

Q. Does anyone get anything from that source, the recording of musical compositions used in pictures?

A. Yes, once in a great while when a picture company will want to use one of your songs in a particular picture, we charge them a hundred or two hundred dollars or something like that; but not all songs in pictures are paid for; the majority are not.

I must qualify that. I am talking about original compositions, the first time put in pictures; I don't mean a com-

position four or five years old where the company wants the synchronization rights. That is a different thing altogether. Where the company takes the song in its original form to put in the picture they don't pay you for it.

Q. When you do make a deal it is a fixed amount, and they pay it on the spot, and that gives them the right to play the music and display the picture as much as they want and wherever they want?

Mr. Finkelstein: I object to that; it assumes a state of facts not shown on the record.

A. Yes.

[fol. 863] Q. What was that thirty or forty thousand dollars for advertising that you spoke of; what was that for; how was that spent? Just break that down a little bit; not in any detail, but generally.

A. Mostly overhead; salaries and things of that kind, insurance, rent, telephone, telegrams, royalties.

Q. I am afraid that we don't understand each other.

A. I said overhead.

Q. You made a statement in your testimony, as I get it—if I am wrong you can correct me—that your firm spent thirty or forty thousand dollars per month for advertising.

A. And I qualified the term "advertising" in my testimony at the time.

Q. Let us have that again. What did you mean by that, Mr. Schwartz?

A. I said advertising includes all our men in the branch offices, their salaries and expenses, our expenses here in New York for our contact men, and various other expenses that we have to pay.

Q. In other words, thirty or forty thousand dollars per month is your whole overhead, including the advertising and everything else?

A. That is right.

[fol. 864] Q. What is your gross business; what amount of gross business does your firm do?

A. I have seen months as low as eight or ten thousand dollars, and some months as high as forty to fifty thousand dollars, but very few.

Q. An average of the year would be what, say for 1937, the gross income of your firm?

A. The average of the year would be between fifteen and twenty thousand dollars.

Q. I guess we don't understand each other some place along the line, because you have stated to us here that there was thirty to forty thousand dollars per month spent for your overhead.

A. That is right.

Q. You couldn't have twenty thousand dollars business per month.

A. When you say gross business do you include receipts from the American Society?

Q. Yes.

A. Then add about twenty thousand dollars and that comes up to the \$100,000.

Q. \$100,000 is what you get from ASCAP. How much do you get from all other sources?

A. I said over \$100,000 a year from ASCAP.

[fol. 865] Q. How much over \$100,000; considerable? Do you remember?

A. I guess it would be about—it may run to \$150,000.

Q. \$150,000 a year. Can you give us an estimate of your gross business aside from that \$150,000 annually say for 1937?

A. I would have to look it up, because I don't remember what we got from records. I know what we got from sheet music. Sheet music and orchestrations, they average between fifteen and twenty thousand dollars.

Q. Gross income is what I was getting at. Between fifteen and twenty thousand dollars from sheet music and orchestrations.

A. And orchestrations.

Q. Are you one of the biggest publisher members of ASCAP, would you think?

A. One of the biggest.

Q. Who would you say had a bigger right in the Society than yourself?

A. Harms, Inc. would.

Q. Anybody else?

A. I think they are about the biggest.

Q. Do you know what Harms receives from ASCAP?

A. No, I do not.

[fol. 866] Q. Do all of the music publishers have a catalogue similar to yours that they publish?

A. I think quite a number of them have; I don't think all of them have. Some publishers don't go to the trouble of printing them.

Q. How many pieces of sheet music would you say that you sold in a year?

A. I can't answer that.

Q. Can you give us an estimate?

A. No, I would have to determine it by the sale price; some sell for twenty, twenty-two, twenty-four cents, twenty-five; I would have to do some figuring, and it wouldn't be true.

Q. Now, then, could you look up from your records and files in your office and give us the total amount or the total number of sheet music that your firm sold in 1937, and divide it into orchestrations and regular sheet music of all kinds?

Mr. Frohlich: I object to that as incompetent, irrelevant, immaterial to this issue and places an undue burden on the witness and calls for a lot of calculation.

A. How much time have I got?

Q. Is that much of a burden? You could have all the [fol. 867] time that you wanted. Any time that you had it would be all right. Is it a big job or not?

A. Yes, it is a big job. I would have to have some time on it. It is really a big job.

Q. I would like to have the total number in this record of a concern like yours that have these orchestrations and sheet music for sale.

A. It would take a long time. Take orchestrations; you might print up ten thousand orchestrations; you give away a lot of them free. It is a big job. If we had time we could do it.

Q. Now that you have hit on that point of giving music away, tell us just a little bit more of how that works and why you do it.

A. We go it to people on the radio to get them to play a song, our songs, because a song on a sheet of paper means nothing until it is popularized, until the public hears it; and you have to have singers that do that for you; you have got to give it to them; they won't buy it.

Q. That is one of your methods of advertising and getting other people to buy; when they hear it on the radio or by a band, they go down to the music store and buy it?

A. Yes.

Q. Do you give them anything else by way of inducement? [fol. 868] A. We give them vocal orchestrations.

Q. Vocal orchestrations are free, gratis?

A. We give them professional copies.

Q. By professional copies you mean, of course, to leading singers and artists?

A. Yes, to all of them. We don't get any part of that.

Q. Why do you do that?

A. For the same reason. If you have a singer on the air and you don't give him a professional copy, what is he going to sing?

Q. In your catalogue that was introduced in evidence and marked Exhibit 5, I want to ask you to explain the list on the righthand side of the page. What does that mean? For example, I have page 110, and it says—there is an "M" before the top line, "Who Wouldn't Say Yes"?

A. That means it is in manuscript form.

Q. What does "B" mean?

A. It is in black and white; we have published it and have it without color on the title page.

Q. Over on the righthand side it says—

A. The name of the author and composer.

Q. Those names there are the authors or composers?

A. That is right.

Q. Aside from Irving Berlin, do you have any men or [fol. 869] women in your employ who write songs for you?

A. Not in our employ. They all work on a royalty basis.

Q. Is your catalogue accurate?

A. Yes.

Q. It is the same, or should be the same, at least, as the records in the Federal Copyright Office?

A. Yes.

Q. Now, in the year 1922, for example, your catalogue here shows about 89 numbers that were copyrighted. And isn't it true that the Copyright Office records show 115?

A. Did you count the popular and the production?

Q. Would you say then that if, referring to the catalogue, it included those compositions from musical productions and the popular songs that it would be the same?

A. Yes.

Q. The price that is fixed here in New York by the American Society of Composers, Authors and Publishers for the public performance rights of music is fixed for the State of Nebraska; it prevails in the State of Nebraska?

Mr. Finkelstein: I object to that on the ground that it assumes a state of facts not shown in the record.

A. I don't know the workings of the Society.

Mr. Hotz: I think that is all.

[fol. 870] Redirect examination.

By Mr. Frohlich:

Q. Mr. Schwartz, if you published a composition today in Nebraska, could you put on that composition a price for the use in television, could you today with any degree of accuracy put on a price that would be adequate and commensurate with the work for the full twenty-eight years of the copyright?

A. No.

Q. As a matter of fact, a composition fluctuates in value over the years?

A. Yes.

Q. Some become of less value and some of very great value?

A. Yes.

Q. Is that true of every item in your catalogue?

A. Yes.

Q. Could you today tell with any degree of accuracy how valuable television might be twenty years from now?

A. No.

Q. You could not, could you?

A. No.

Q. If you had to fix the price on compositions that you had copyrighted or published, in Nebraska, today you [fol. 871] couldn't change that price at any time in twenty-eight years. Could you, having that in mind, fix any price that is fair and reasonable either to the user or to yourself?

A. No, I could not.

Q. To what extent does the value of your compositions fluctuate? Do they fluctuate weekly or monthly or yearly?

A. There is no specific time.

Q. Does the value of your compositions remain constant and fixed?

A. No.

Q. Take an important composition that you have had

in the last two or three years; take Irving Berlin's "Top Hat"; there is such a composition?

A. "Top Hat, White Tie and Tails."

Q. Was that very popular while the composition was on the screen?

A. Yes.

Q. How long did that popularity continue?

A. It is still being played all over the country.

Q. Is it being played as much as it was at that time?

A. No.

Q. Has there been a marked falling off in the sale of the musical composition?

[fol. 872] A. Ninety-nine per cent.

Q. Is there any way of telling whether that composition will have any popularity ten years from now?

A. No.

Q. I call your attention to a composition published by you in 1937 called "Carelessly", by Charles Kenny, Nick Kenny and Kalmar?

A. Yes.

Q. Was that a popular composition?

A. Yes.

Q. How long did its popularity continue?

A. About six weeks.

Q. Is the composition popular at the present time?

A. No.

Q. Would the right to play this composition for public performance for profit be the same today as it was at the time you published it?

A. No.

Q. Would the value or the price for that composition for the public performance for profit be the same a year from now as it was at the time you published it?

A. No.

Q. It might be more? <

A. No.

[fol. 873] Q. Less?

A. It might be less.

Q. Could you tell within ten weeks after a composition is published what its value would be for public performance for profit?

A. No, I can't.

Q. At the time you publish a composition and you fix the

value on that composition, would there be a likelihood that the value would be more or less in ten weeks?

A. There would be the likelihood that it would be ten times as great as at the time we put the value on it.

Q. And ten weeks after that?

A. No.

Q. In other words, there is a change, a marked change, almost every week on these compositions?

A. Yes.

Q. That is, some compositions take longer to reach a stage of popularity than others?

A. Yes.

Q. And the degree of popularity of the composition would determine to a great extent its value in public performance for profit?

A. Yes.

Q. And you would have to take that into consideration [fol. 874] in fixing the supply?

A. Yes.

Q. Can you with all your experience tell what composition would be popular?

A. No man has ever been able to do that.

Q. Of the compositions that you publish each year, how many become popular?

A. A very small percentage.

Q. What percentage, roughly?

A. I would say ten per cent.

Mr. Frohlich: I think that is all.

Recross-examination.

By Mr. Hotz:

Q. Mr. Schwartz, you could change the price of your music and increase its price when it became more popular, as the numbers of copies were sold, couldn't you?

A. We might, but it wouldn't be good business.

Q. And by my question I mean to include public performance rights.

A. But we can't fix that.

Q. You could fix them if you wished to do so?

Mr. Frohlich: It is hypothetical and it is not based upon anything in evidence; it is not within the language of your statute.

[fol. 875] Mr. Hotz: That is correct.

Q. Each piece of music that is sold out, we will say, in the State of Nebraska, and that had stamped thereon the price for public performance rights, would be fixed and determined as of the status today, would it not?

A. We couldn't stamp it; we wouldn't know what to stamp.

Q. If you did agree with your composer and the two of you agreed as to what price should be stamped on that piece of music, if you sold more music in six months from now or eight months from now, you could increase it on the number of copies that were sold?

Mr. Frohlich: That is objected to; it assumes a state of facts not in evidence. The law states that once the price is stamped thereon it is for all purposes and any purchaser of the music that pays the price so stamped has the right to use himself or through others for all purposes within the State of Nebraska; it assumes a state of facts not in evidence.

Mr. Hotz: Counsel is in error because the statute specifically provides that nothing in that section or in the Act should be construed to give to any purchaser of copyrighted musical composition the right to resell, copy, print, publish [fol. 876] or vend the same.

Mr. Frohlich: And we are talking about performance rights and television.

Q. You continue to sell copyrighted music; you don't merely sell one piece, do you?

A. We sell music.

Q. You sell more than one?

A. Sure.

Q. And in a piece, take for example in the supplement to your catalogue, let us just take "Red Rhumba," published by you in 1936, about how many copies of that would you say that you would have printed up right at the beginning?

A. Oh, about three thousand.

Q. Those are not all sold at once?

A. No.

Q. You are still selling them?

A. We might sell more.

Q. You might sell more. Those prices remain standard?

A. Yes.

Q. It does?

A. Yes.

Mr. Frohlich: The price for what?

The Witness: A copy.

[fol. 877] Mr. Nye: For sheet music, that is what we are talking about.

Q. Your big business comes from orchestrations, does it not?

A. No.

Q. It comes from what?

A. Sheet music.

Q. Now, on the public performance for profit, that income that ASCAP receives is largely, is it not, for the use of music for orchestras and bands and things of that sort rather than sheet music?

Mr. Frohlich: Objected to; that assumes a state of facts not in evidence.

A. No, it can't be.

Q. You wouldn't say that?

A. No.

Q. Sometimes sheet music and sometimes the other?

A. No, it is just the whole thing.

Q. The whole business?

A. Yes.

Q. You know, do you not, that ASCAP changes the license from time to time and increases it, do they not, for public performance?

Mr. Frohlich: Objected to; assumes a state of facts not [fol. 878] in evidence; no proper foundation laid.

A. I don't know how they do that.

Q. You don't know anything about that?

A. No.

Mr. Hotz: I think that is all.

Q. Is the sheet music that is sold or given away and that is carried in the music stores out in Nebraska, for example, is that available or usable by orchestras and bands and so forth in the form that it is in?

A. Piano players can use it and guitar players can use it.

Q. What about orchestras?

A. They use an orchestration.

Q. They use an orchestration. And do you sell orchestrations?

A. Yes.

Q. Do you give away a good many of the orchestrations?

A. Yes.

Q. Why do you do that?

A. So that the band leader or orchestra leader will play it.

Q. And popularize the music?

A. Yes.

Q. And so that people will come in and buy the sheet [fol. 879] music?

A. Yes, and also buy phonograph records, and also that people will hear the song in different places of amusement where they go.

Q. So that the sheet music business is not a dead letter completely, is it?

A. I didn't say it was; we still do \$20,000.

Q. \$20,000 a month in sheet music?

A. And orchestrations.

Q. In the orchestrations of music, the form and manner in which it is gotten up, is there anything that would prevent printing or having affixed thereon the price for public performance in the State of Nebraska?

Mr. Frohlich: I object to the question as indefinite. Do you mean there is nothing to prevent the physical printing of the price on the sheet?

(The pending question was read by the stenographer.)

A. That would apply the same as we talked before; we couldn't affix a price without knowing the price to affix.

Q. Assuming that you and the composer had the necessary information, there would be nothing that would prevent it?

[fol. 880] Mr. Frohlich: The question is objected to as hypothetical and assuming a state of facts not in evidence.

A. If we could get the information that I testified to before we could do anything we wanted.

Mr. Hotz: I think that is all.

(Adjourned to May 24, 1938, at 10:30 o'clock a. m., at the same place.)

[fol. 881] DEPOSITION OF WALTER S. FISCHER

[fol. 882] 1450 Broadway, New York, N. Y.,
May 24, 1938, 10:30 a. m.

Met pursuant to adjournment.

Appearances: As before.

WALTER S. FISCHER, called as a witness on behalf of the plaintiffs, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. What is your name and address?

A. Walter S. Fischer, Darien, Connecticut.

Q. Are you connected with the firm of Carl Fischer?

A. I am President of Carl Fischer, Inc.

Q. Is Carl Fischer, Inc. a corporation?

A. It is.

Q. Of what state?

A. New York State.

Mr. Frohlich: Is that conceded? I don't want to put in [fol. 883] this voluminous certified copy of the certification of incorporation.

Mr. Nye: It is a New York State corporation and he is President; we will concede that.

Q. What business is Carl Fischer, Inc. engaged in?

A. Music publisher.

Q. When did it go into business?

A. 1832.

Q. Who founded it?

A. My father founded the firm in 1832.

Q. Did it commence business in the City and State of New York?

A. It commenced business in the City and State of New York.

Q. Has it been continuously in business in the City and State of New York?

A. Either in that form or as a partnership or as at present, a corporation.

Q. What is the nature of the business conducted by Carl Fischer, Inc.?

A. We are music publishers. We also have a retail department. We also do, in connection with that retail department, a retail mail order business.

Q. What do you publish?

A. All kinds and varieties of standard music.

Q. Suppose you give us a definition of "standard".

[fol. 884] A. Standard is a word that is difficult to define, because there are sometimes certain compositions which are first popular music. Standard is music that is not exploited as popular music is exploited; has a lasting value; some of it has artistic value; a lot of it has educational value, the type of music that is used by people not using popular music; popular being defined as music that has a short life and is exploited in a peculiar way by so-called popular publishers.

Q. Is Carl Fischer, Inc. a member of the American Society of Composers, Authors and Publishers?

A. We are.

Q. Since when have they been members of that organization?

A. Have you got it there? I don't know exactly.

Q. Approximately?

A. Twelve years.

Q. I show you this document dated April 12, 1935, and ask you whether you recognize these signatures?

Mr. Nye: We will admit that that is the contract that he has with the plaintiff Society and that his organization is a member of it.

Mr. Frohlich: May I use a photostat in place of the original?

[fol. 885] Mr. Nye: That you may use a photostat in lieu of the original.

Mr. Frohlich: I offer it in evidence.

(The document just offered in evidence was marked Plaintiffs' Exhibit No. 6, of this date.)

Q. Have you brought with you a catalogue of the compositions published by your firm?

A. Yes, I have.

Q. May I have them? (Several pamphlets produced by the witness.) Are these documents you hand me a catalogue of the copyrighted musical compositions of Carl Fischer, Inc.

A. Yes; they constitute a catalogue of the musical compositions of Carl Fischer, Inc.

Mr. Frohlich: I will offer these in evidence.

A. (Continued:) With possible exceptions of recent publications which have not yet been incorporated.

(Thirteen printed pamphlets just offered in evidence were marked respectively Plaintiffs' Exhibits 7-A, 7-B, 7-C, 7-D, 7-E, 7-F, 7-G, 7-H, 7-I, 7-J, 7-K, 7-L and 7-M, of this date.)

Q. Mr. Fischer, these catalogues, Plaintiffs' Exhibits [fol. 886] 7-A and so forth, consisting of thirteen booklets, will you be good enough to explain why you print up your catalogue in these thirteen volumes instead of putting them in one volume?

A. Because the music is segregated: Piano music, violin music, organ music, vocal music, wind instrument and reed music, band music—I don't know what else I might have overlooked—sacred and choral music, secular choral music, violin and harp music, woodwind and reed music, brass instrument, accordion, and of course orchestra music; then there is a catalogue of books on music.

Mr. Hotz: Are they duplicates?

The Witness: There are many of those titles that are duplicated, but the bulk of the catalogue is not duplicated. You mean a duplication as to title?

Mr. Hotz: No; if the music in your catalogue would be listed in more than one catalogue.

The Witness: It would be listed in more than one catalogue. If it was listed for piano it would be listed in the piano catalogue and if it was listed for orchestra it would be listed for orchestra also.

Q. Where is your principal place of business located?
[fol. 887] A. 52-56 Cooper Square.

Q. In New York City?

A. Yes, in New York City.

Q. Does the firm own the building down there?

A. No, we lease the building.

Q. Have you a long term lease?

A. Five-year lease.

Q. What is the annual rental?

A. We lease the building on a basis of paying the taxes;

our rental—we have two buildings down there; one adjoins the other; the one is used as a store room and warehouse and the other for the purpose of doing our business. Our rental in 56-62 Cooper Square is \$24,000 plus taxes.

Q. Annually?

A. Annually; and in 52-54 Cooper Square, the adjoining building, \$4,000 plus taxes.

Q. About what are the taxes, approximately?

A. The taxes last year amounted to \$12,306, that is the real estate taxes; of course we also pay the water bill; 56-62, \$12,306, and 52-54 Cooper Square, \$1,699.

Q. Prior to the time that Carl Fischer, Inc. became a member of the Society, did your firm ever obtain any compensation for the use for public performance for profit of any of your works?

[fol. 888] A. Yes.

Q. In what way?

A. Well, we had so-called manuscript works which we rented out to symphony orchestras.

Q. Aside from symphonies, speaking of the great bulk of your works, did you receive any compensation for those rights?

A. No.

Q. Did you receive any compensation for these symphony manuscripts unless you rented them?

A. They couldn't obtain the works unless they rented the material from us; it was not available except in rental form.

Q. Do you employ any writers of music, composers of music?

A. Yes.

Q. In addition to the writers and composers in your employ, do you publish compositions for other writers and composers?

A. We certainly do.

Q. What is the practice in regard to publishing compositions of writers in your employ and those not in your employ?

A. The writers in our employ are employed for hire and [fol. 889] and we publish their material if we see fit to publish what they produce.

Q. Do you copyright them in your own name?

A. Yes.

Q. And with respect to writers who are not in your employ?

A. The practice is very different, depending on the circumstances. Sometimes we buy manuscripts outright; sometimes under royalty contracts.

Q. Have you with you a typical contract that is issued by your firm to a composer?

A. I have.

Q. May we see them?

A. I brought with me a number of different forms of contracts involving different propositions. I would say that was a typical contract (producing paper).

Q. You have produced a contract with Richard Hageman dated November 17, 1936; is that the original contract with the signature of Mr. Hageman?

A. Yes.

Q. And the signature of a member of your firm as well?

A. That is my signature.

Mr. Frohlich: I will offer it in evidence.

(The document just offered in evidence was marked [fol. 890] Plaintiffs' Exhibit No. 8, of this date.)

Mr. Bennett: Do you want to substitute a copy?

Mr. Frohlich: I would like to. I don't like to take these originals away from the witness.

Q. What was the method of procedure under which you secured, copyrighted and published the composition that is mentioned in Exhibit 8?

A. We secured the right to publish under that contract the manuscript, and then we published the manuscript with our copyright notice and registered it at Washington, an unpublished manuscript.

Q. Was that copyrighted as a published or unpublished work?

A. As a published work.

Q. Did you follow the practice of copyrighting your composition as an unpublished work?

A. No, but sometimes unpublished works have been copyrighted before we acquired them, by the composer.

Q. But the practice of your firm is to acquire the work and to publish and to copyright upon publication?

[fol. 891] Q. That is done practically all the time by your firm?

A. Ninety-nine per cent of the cases.

Q. Have you another form of contract with some other composer?

A. Yes.

Q. Will you be good enough to produce it?

A. Here I have an instance where the composer copyrighted his work in manuscript before we acquired it (producing paper). This is a contract made with a man by the name of Green who had copyrighted the works in manuscript before we acquired them, and that is an assignment of the copyright in the unpublished work, and this is the contract made with the composer (producing papers).

Q. These two documents?

A. These two documents, yes.

Mr. Frohlich: I will offer these in evidence, as one document.

(The documents just offered in evidence were marked Plaintiffs' Exhibit No. 9-A and Plaintiffs' Exhibit No. 9-B, of this date.)

Mr. Frohlich: May it be stipulated that we can use photostats in place of these originals?

[fol. 892] Mr. Nye: Yes.

Q. These two contracts, Plaintiffs' Exhibits 9A and B, represent a situation where a composer had already copyrighted his work as an unpublished work and then came to you and you made a deal with him and took over the composition and you proceeded to publish it and copyrighted it in your own name?

A. Right.

Q. Would you say that this represents a small or large portion of the manner in which you acquire your works?

A. Small, I imagine.

Q. The great bulk of your work is acquired as set forth in the previous contract, Exhibit 8?

A. Yes.

Q. Under all of these contracts you are obligated to pay royalties to these authors and composers from time to time?

A. Yes.

Q. Do those contracts 8 and 9 have provisions for the payment of mechanical royalties to these composers and writers?

A. Yes.

Q. Do these contracts have any provisions for the payment of any moneys for public performance for profit?
[fol. 893] A. They do not.

Q. So that unless the writer is a member of the American Society of Composers, Authors and Publishers he receives nothing, so far as you know, for his performing rights?

A. That is correct.

Q. Now, would you say that the great bulk of your writers and composers, those for whom you publish, are members of the American Society of Composers, Authors and Publishers?

A. I wouldn't say all of them are; a great many of them are; whether it is a majority or not I would have to check on that. A great many writers we publish for are not members of ASCAP.

Q. Do you publish compositions in this country that had previously been copyrighted in any of the European countries?

A. Yes.

Q. Will you tell us the mechanics of how that is done?

A. Well, of course, they vary too, depending upon circumstances. I have here a contract made with the Union Musical Espanola covering a transcription of a work by Sevida, made by Heifetz. We published the transcription by Heifetz.

[fol. 894] Q. Was that done under a contract?

A. That was done under a contract with Heifetz and a contract with the original publishers.

Q. Have you the contract with the original publishers?

A. I have (producing paper).

Q. May I see it please?

A. (Paper handed to counsel.) Our rights under this are restricted to the use of this transcription in North and South America; it provides they should have the right to publish the transcription in all other countries.

Mr. Frohlich: I will offer these two contracts as one document, in evidence.

(The documents just offered in evidence were marked Plaintiffs' Exhibit No. 10-A and Plaintiffs' Exhibit No. 10-B, of this date.)

Q. Have you another form of contract made by you under which you publish foreign compositions?

A. Not with me, no.

Q. Have you some form of contract there with reference to foreign works?

A. Some other foreign work. The one I have given you is the one I have here.

Q. Do you publish any of your compositions in European [fol. 895] countries?

A. We have granted other publishers the right to publish.

Q. How is that arranged. How do you do that?

A. There are numerous agreements that we make; sometimes we give them a limited right to publish for a number of years, predicated on a renewal of that contract if they sell so many copies. In other instances we give them the complete right subject to recovery if they do not sell a minimum number of copies in a given period. In other instances we have sold the copyrights.

Q. You have no foreign company affiliated with Carl Fischer, Inc.?

A. No.

Q. Do you trade with other firms or corporations in European countries for these foreign rights?

A. Yes, for individual works.

Q. When you publish in England, you trade with an English concern?

A. Yes.

Q. And on the Continent with some continental firm?

A. Sometimes an English firm will publish on the continent. Sometimes the rights will be divided; for instance, the "Stein Song", we gave the right to publish in England to one firm, and to another firm the right to publish in [fol. 896] Australia, and another one the right to publish in Germany.

Q. Have you some other form of contract with you?

A. I have a form of contract here where we acquired the song called "Shadrac" by Robert McGurnsey, from the Southern Music Publishing Company, publishers.

Q. Before they made any contract with you had they copyrighted the composition?

A. I imagine they must have because they retained—I mean, we had to—our assignment to us was subject to any contract or license they had heretofore made on behalf of the composer. This is the bill of sale, from Southern to us.

Mr. Frohlich: I will offer it in evidence.

Mr. Nye: We are noting an objection as to the materiality of all these exhibits.

(The documents just offered in evidence were marked Plaintiffs' Exhibit No. 11-A and Plaintiffs' Exhibit No. 11-B, respectively, of this date.)

Q. Now, Mr. Fischer, the contracts that we have placed in evidence this morning, are they representative contracts?

A. The only representative contract is the first contract; the others are all special contracts.

Q. This first contract, which is Exhibit 8, is a contract [fol. 897] with Hageman?

A. That is a representative contract.

Q. Would that represent the usual bulk of contracts with your firm?

A. Yes.

Q. You have other special contracts of the type of these other documents that you have produced this morning?

A. Certainly.

Q. Have you purchased any renewals of copyright in the past few years?

A. Do you mean purchased from the composers, previously published by someone else?

Q. Yes.

A. No.

Q. Have you obtained the right to renew the copyright from artists or composers who previously had contractual arrangements with you?

A. Yes, a great many.

Q. In every case where there is a renewal, are you required to negotiate with the owner of the renewal right?

A. Where once it is covered by contract and the composer is still alive, then we don't think we are required to negotiate.

Q. If the composer is dead, you negotiate with his [fol. 898] widow?

A. Whoever may be the legal owner of the renewal right we have to negotiate with.

Q. Is it your custom to have a new contract made for a further period of twenty-eight years?

A. Yes.

Q. Do you some-times on these negotiations pay an advance royalty to the owner of the renewal right?

Mr. Nye: I object to all this as being purely speculative, not the proper way in which to prove the custom of the business; the custom of the business being immaterial.

A. Yes.

Q. Do you publish any compositions, Mr. Fischer, that are interpolated or incorporated in stage productions?

A. Occasionally, yes; in motion picture productions, not in stage productions.

Q. Can you tell us the name of a composition that you published in the last three or four years, of that type?

A. Yes; in the picture "The King Steps Out," in which Fritz Kreisler's music was used.

Q. Did you restrict that number?

A. No.

Q. Do you restrict any of your numbers?

[fol. 899] A. Yes.

Q. What numbers do you restrict?

A. For instance, among these contracts here, that song "Shadrac" was restricted for a time, by the insistence of a composer who wanted to be sure that the song was introduced by a reputable artist.

Q. When you restrict a number do you notify the American Society of Composers, Authors and Publishers to take it off its active list?

A. Yes, we are required to, and they are so notified.

Q. What was the reason for restricting this particular number, "Shadrac"?

Mr. Nye: Objected to as calling for a conclusion, speculation.

Q. If you know, what was the reason for restricting that song; why did you restrict it?

A. I just stated, because the composer was very particular; he wanted the number introduced by a reputable artist and we knew we couldn't get the cooperation of this particular artist if lesser artists were doing it at the same time.

Q. If that particular number were being played over the radio or other places, would it have injured the number?

Mr. Nye: Objected to as speculative.

A. Yes.

[fol. 900] Q. That was the artist's contention, I mean?

A. Yes.

Mr. Nye: I move to strike out the answer as stating a conclusion only.

Q. Does that happen in many instances?

A. Not in many instances; that is exceptional.

Q. Do you also grant to motion picture companies the right to synchronize some of your musical compositions in their pictures, from time to time?

A. Yes, we do.

Q. Can you give us the names of some compositions that you have licensed for that purpose within the last three or four years?

A. I can give you names of some; there are a good many of them; "Washington Post March", by Sousa; "On The Mall" by Goldman; "Lights Out" by McCoy.

Q. Are these licenses given by you under some special contract?

A. They are granted through an agent and trustee.

Q. And you receive a special compensation for that right?

A. Yes, we do.

Q. You don't receive them from the Society?

A. No.

[fol. 901] Q. Do you frequently grant the mechanical reproduction rights of your works to manufacturers of piano rolls and disk records?

A. Yes.

Q. Is that done in many instances?

A. Our contracts are relatively few as compared with the popular publishers.

Q. When you grant such rights to a producer or manufacturer of records and piano rolls, do you grant any rights other than the right to make the records?

A. That is all we grant.

Q. Have you any control over the disposition of his records or piano rolls?

A. No, except that he is limited by that contract to certain music he can make.

Q. Have you a form of such a contract with you?

A. Yes, one with the Victor Company (producing paper); no, that is with the R-C-A Manufacturing Company.

Q. Is this a contract made with reference to a composition entitled "Two Guitars"?

A. Yes.

Mr. Frohlich: I will offer it in evidence.

(The document just offered in evidence was marked [fol. 902] Plaintiffs' Exhibit No. 12, of this date.)

Q. Now, Mr. Fischer, this contract, Plaintiffs' Exhibit 12, with the R-C-A Manufacturing Company, Inc., represents a typical mechanical contract entered into by your firm?

A. Yes, it does.

Q. Under this contract the R-C-A Manufacturing Company, Inc. is merely required to pay you so much per record manufactured, isn't that right?

A. That is correct. Wait a minute; doesn't it say, "records manufactured and sold"? "Manufactured and sold".

Mr. Nye: I object to that; the exhibit is the best evidence.

Q. Is there any way in which you could compel R-C-A to put on its records sold in the State of Nebraska any price for all uses of the composition?

Mr. Nye: Objected to as calling for a conclusion, the contract being the best evidence.

A. No.

Q. Does R-C-A act as your agent in any way?

A. No.

Mr. Nye: I object to that as calling for a conclusion.

Q. Have you any control whatever over the sale of the [fol. 903] records manufactured by the R-C-A Manufacturing Company under this contract?

Mr. Nye: I object to that as calling for a conclusion; not the best evidence.

A. No, we have no control.

Q. Are you willing to allow the R-C-A and other manufacturers of record and rolls of your compositions to act as your agent in the disposition of the public performance rights for profit in the State of Nebraska?

Mr. Nye: That is objected to as speculative.

A. Definitely not.

Q. Do you sell any of your compositions in the State of Nebraska?

A. We do.

Q. When I say "compositions," I mean copies of your sheet music in the State of Nebraska.

A. Yes, we do business in Nebraska.

Q. Have your compositions over the years been performed in the State of Nebraska?

A. I believe so.

Mr. Nye: I move to strike out what the witness believes; no sufficient foundation.

A. I will answer that differently. Obviously they have.

Mr. Nye: Same objection.

[fol. 904] Q. Do you know of your own knowledge whether any of your works have ever been performed in the State of Nebraska?

Mr. Nye: Objected to as calling for a conclusion.

A. I have never definitely checked it, so I have no definite knowledge of it.

Q. Have you from time to time sold many copies of your compositions to dealers or jobbers of music in the State of Nebraska?

A. We do business there regularly; I don't know how much our business amounts to with the dealers in the State of Nebraska; I haven't checked it.

Q. Have you an office there in the State of Nebraska?

A. No.

Q. Any agent or representative there?

A. We have a western representative who covers the State of Nebraska.

Q. Is he located in the State of Nebraska?

A. No; we have a representative in Chicago, and one in Los Angeles. As a matter of fact, I don't know which of them covers Nebraska.

Q. Are you able to print on the face of your musical compositions sold in the State of Nebraska the price to be charged for the use or rendition of your copyrighted musical compositions within that State, for all purposes?

Mr. Nye: Objected to as calling for speculation, immaterial and being purely hypothetical.

A. It would be quite impossible for us to do that.

Mr. Nye: I move to strike out the answer on the ground that it states a conclusion, and not a statement of fact.

Q. At the time that you sell one of your compositions in the State of Nebraska, can you determine and fix the price to be charged for the use and rendition of your copyrighted musical compositions within that State for all uses?

Mr. Nye: Same objection.

A. And for all time?

Q. And for the full length of the copyright renewal?

Mr. Nye: Same objection.

A. We could not.

Q. If you were acting alone and not in combination with any of the other members of the Society, could you determine and fix the price to be charged for the use or rendition of your copyrighted musical compositions within the State of Nebraska, at the time you sold them in that State?

Mr. Nye: I object to that as assuming a hypothetical state of facts not in evidence.

[fol. 906] A. Could I determine and fix the price?

Q. Which would cover all uses, including the right to publicly perform for profit, for the full term of the copyright and renewal?

Mr. Nye: Same objection.

A. No, we could not; there are too many factors that may come into being; we couldn't tell what we should charge; it is impossible.

Mr. Nye: I move to strike out the answer, all except the word "no", as not responsive.

Q. In determining such a price to be charged for the use or rendition of your copyrighted musical compositions within the State of Nebraska, what factors would you have to take into consideration?

Mr. Nye: Objected to as calling for speculation.

A. The particular vogue of the composition, that is what we would have to know to determine its value, because you take for instance one man may write a dozen songs and out of those dozen songs one may be the outstanding song and have value; we wouldn't be justified in fixing the same price for the other eleven songs as for that one particular outstanding song. There is no way we could determine in

advance which song will be the successful one or the one [fol. 907] that will be accepted.

Q. Let us take any particular composition, whether successful or not, and you are required to determine and fix the price to be charged for all uses and purposes at the time you sell the composition in the State of Nebraska, what elements would you have to take into consideration in relation to the establishment of the price at which this composition would be sold?

Mr. Nye: I object to that as speculative, assuming a hypothetical state of facts not in evidence.

A. We would have to take a lot of elements, the nature of the performance, the means of its performance, the vogue of the song, its present sale, its possible future sale.

Q. Do those factors vary from day to day or are they constant?

A. And also our contractual relation to the composer.

Mr. Nye: I move to strike out the answer as not responsive.

Q. Do any of those factors vary from day to day?

A. Absolutely, they vary from time to time.

Q. In order for you to ascertain the information required to enable you to consider those factors, would you have to [fol. 908] employ somebody in the State of Nebraska to obtain that information for you?

Mr. Nye: I object to the question as calling for speculation.

A. I do not see how this information could be available to us unless we got it from our agents whom we would have to employ to get the data for us.

Q. What would you have to pay these men to get this information for you?

Mr. Nye: Objected to; no sufficient foundation laid.

A. I think that would be difficult to value; it would take an intelligent high type of man to do that work.

Q. Can you tell us what you would have to pay some intelligent and high type of man to do this work?

Mr. Nye: Same objection.

A. I suppose you would have to pay him fifty dollars a week, plus his traveling expenses.

Q. Assuming that there were 367 places of entertainment or establishments in the State of Nebraska that used music, would you have to employ such men to go around among these 367 establishments constantly?

Mr. Nye: I object to that as being purely speculative, calling for a conclusion.

[fol. 909] A. I don't see how you could get any information unless you contacted the various people who were using the music, and found out what use they were making of it.

Mr. Nye: I move to strike out the answer for the same reason.

Q. Would you have to keep a constant check on the nature of their performances, and how they varied, and how the establishments varied?

Mr. Nye: Same objection.

A. Definitely, because they may be having a large band one time and a small group another time and they may be giving a performance of dinner music and they may be giving it for dance purposes at another. There are a lot of changes.

Q. Would the profits of the establishment have some bearing on your determination?

A. Yes, it would.

Q. Would the size of the dance hall have some bearing?

A. That definitely would.

Q. Would the dignity and manner of the performance have some bearing?

A. I think that in certain instances it might be very important.

Q. Having obtained all that information, would you have to employ somebody to keep a check on these establishments [fol. 910] to see whether or not they infringed upon your compositions?

Mr. Nye: I object to the question; no foundation laid; speculative.

A. I don't see how you could get a record of the works that would be performed from your catalogue without a careful checking; it would be impossible.

Mr. Nye: I move to strike out the answer for the same reason.

Q. Would you have to have someone check up to see whether or not performances were made on copies that were sold within the State of Nebraska or purchased outside of the State of Nebraska?

Mr. Nye: I object to the question as speculative.

A. I don't understand the question fully. (The pending question was read by the stenographer.) I would. We couldn't tell whether the copy being used was purchased within the State of Nebraska or without the State of Nebraska, without seeing the copy and having identified the copy.

Q. Do you make a practice of selling any of your musical compositions and determining and fixing the price for all uses and purposes of such compositions in any State, outside of the State of Nebraska?

[fol. 911] A. We don't do it in any place, not in Nebraska or elsewhere.

Q. Would you have to employ a lawyer to protect you against infringements in the State of Nebraska?

Mr. Nye: Objected to as calling for a conclusion and speculation.

A. We would probably have to employ a staff of attorneys.

Q. What do you think it would cost you; what do you estimate?

A. That would be a speculation.

Q. Going back to the investigator that you said you would have to employ to obtain the information with relation to these various establishments, would such an investigator have to have some musical skill and knowledge?

A. Definitely, yes; he would have to be able to recognize music if played from our catalogue.

Q. Would that be true in relation to the man who would have to go out and detect infringements of your works; would he have to be musically trained?

A. Yes, certainly.

Q. You have employed many persons in your concern from time to time in various capacities, have you not?

A. Yes.

Q. What salary do you have to pay a man who has some musical knowledge or skill?

[fol. 912] Mr. Nye: I object to the question; no proper foundation.

A. Seventy-five or a hundred dollars a week.

Q. Have you employed attorneys from time to time in infringement work?

A. Yes.

Q. Are you familiar with the fees charged by attorneys in representing you in infringement work?

A. I know what our own attorneys are charging us.

Q. I mean your own attorneys. Are you familiar with the fees they charge?

A. Yes.

Q. Your attorneys that represent you in infringement work are skilled in copyright litigation?

Mr. Nye: I object to the question as calling for a conclusion, no proper foundation laid.

A. Yes, of course they would have to be.

Q. Would you hire a lawyer who didn't know anything about copyright work?

Mr. Nye: Same objection.

A. Certainly not.

Q. Taking into consideration the salaries paid to employees with musical skill, taking into consideration the fees you paid attorneys that heretofore represented you [fol. 913] in infringement suits, what would you estimate that it would cost you to obtain information in the State of Nebraska respecting the establishments, the cost of detecting infringements and the cost of bringing suits to protect you on infringements within the State of Nebraska?

Mr. Nye: I object to that on the ground that there is no proper or sufficient foundation laid, and calling for conclusion.

A. My answer would be that it would be almost impossible to give any accurate statement as to that, because there are too many unknown factors. It would be a substantial amount of money.

Q. What do you mean by a substantial amount of money?

Mr. Nye: Same objection.

A. Some people consider \$10,000 is substantial. It might be and probably would be in excess of that. I would have to study that before I could give you a more accurate answer. There are too many unknown factors there.

Q. Would you have to establish an office in the State of Nebraska to protect you?

Mr. Nye: Objected to as calling for a conclusion.

A. Yes, I should say we would have to have someone in the State of Nebraska as a responsible representative, prob-[fol. 914] ably with a staff of one or two to assist him.

Q. Can you tell us from your past experience what it would cost to run such an office staff and employees and attorneys; a minimum figure?

Mr. Nye: Same objection.

A. I should say a staff would cost \$100 a week, plus traveling expenses; what they would be I don't know. I don't know what you could rent an office in Nebraska for. I have had no experience out there. I don't know what the attorneys' fees would be. That is a pretty difficult question to give an answer to.

Q. Would it be in excess of \$10,000?

Mr. Nye: Same objection; and leading.

A. Yes, it would have to be in excess of \$10,000 a year; your staff would cost you \$5,200; your traveling expenses would cost, I don't know how much; the rent would cost something, and other incidentals. That is without attorneys' fees, so obviously it would be in excess of \$10,000.

Q. Have you, Mr. Fischer, any present data at your command that would enable you to determine and fix a price to be charged for the use and rendition of your copyrighted musical compositions in the State of Nebraska, for the purpose of television?

Mr. Nye: I object to that as immaterial; calling for speculation. [fol. 915]

A. Of course, we have no such data.

Q. Have you any data at your command that would enable you to determine the value and the price for all uses and purposes of your musical compositions sold in the State of Nebraska at this time?

Mr. Nye: Same objection.

A. No, we have not.

Q. If television is perfected and comes into general use ten years from now, would there be some basis ten years from now for determining the value of a particular composition for television purposes?

Mr. Nye: I object to the question as calling for speculation, and for the further reason that the witness is not qualified to answer.

A. I don't think I would know how to answer that question. I don't know what ten years from now will disclose.

Q. If you are required to determine and fix the present price for all uses and purposes of a musical composition of yours, sold within the State of Nebraska at the present time, is it possible for you, with the information and data that you now have and the experience you have in the business, to place a value at all on this composition for the [fol. 916] purpose of television use?

Mr. Nye: I object to the question for the reason that there has been no foundation laid for the knowledge of the witness; calling for speculation.

A. No, it would be impossible.

Q. And television use might change in value for all purposes from time to time even though it became popular?

Mr. Nye: Same objection.

A. I don't know; nobody knows what that is going to mean. Nobody knew what radio would mean in our business until years of experience.

Q. Assuming that television becomes popular years from now, within the life of the copyrights you own, wouldn't you have to take into consideration in determining and fixing the price to be charged for the use or rendition of your copyrighted musical compositions by television, wouldn't you have to take into consideration the same elements that you would have to take into consideration for the price now?

Mr. Nye: Same objection.

A. Yes.

Q. You couldn't tell that until the time arrived, could you?

Mr. Nye: Same objection.

[fol. 917] A. It would be impossible.

Q. Are any of your compositions played on the national hook-ups of the National Broadcasting Company and the Columbia Broadcasting System from time to time?

A. They are.

Q. How do you receive your moneys—when I talk of yours I mean the company's moneys—from the American Society?

A. By means of a quarterly distribution made by the board of directors.

Q. Can you tell us approximately how much you received from the American Society during the year 1936?

A. I can tell you accurately if you want it.

Q. Will you give us the accurate figures, Mr. Fischer?

A. No, I can't give you the accurate figures, because the statement I have here lumps some other figures with it; approximately \$100,000.

Q. What did you receive in 1937?

A. Approximately \$110,000.

Q. What did you receive in 1935?

A. Approximately \$80,000.

Q. Do you consider this contract, Plaintiffs' Exhibit 6, your contract with the American Society, of great value to you?

[fol. 918] A. Definitely.

Q. What do you estimate the value of that contract to be?

Mr. Nye: Objected to on the ground that it calls for speculation; no foundation laid.

A. Well, to arrive at an estimate, I suppose one way of figuring would be on the basis of the return. On the basis of a ten per cent return, \$1,000,000.

Q. When this contract expires in 1940, is there a likelihood that it will be renewed?

A. These figures that I have given you are accurate figures.

Q. When this contract expires in 1940, is there a likelihood that it will be renewed?

A. We all hope it will be renewed.

Mr. Nye: I move to strike out the answer as not responsive.

Q. As a matter of fact, since you have joined up with the American Society you have received a contract with them each five years?

A. Yes, we have.

Q. This is the last of a series of contracts, 1935?

A. Yes, sir.

Q. And are you willing to have this contract declared [fol. 919] invalid?

Mr. Nye: Objected to as calling for a conclusion; immaterial.

A. Certainly not.

Q. Do the receipts that you obtain from the Society constitute a substantial portion of the net income of Carl Fischer, Inc.?

A. They do.

Q. If these receipts were lost to you would it affect the business of Carl Fischer, Inc.?

A. It would, very seriously.

Q. To what extent would it affect it?

Mr. Nye: I object to the question as calling for speculation.

A. We would be operating at a loss if we were deprived of that revenue.

Q. Since the advent of radio in 1922, have you noticed any falling off in the sale of sheet music by your firm?

A. Yes, there has been a falling off in the sales of certain types of music.

Q. What types were affected; what types fell off?

A. Songs particularly, violin and piano concert music, orchestra and band music.

Q. Were those compositions that were played on the [fol. 920] radio to a large extent?

A. Yes.

Q. Did you find any ratio between the increase of performances of compositions over the radio and the decrease of your musical compositions?

A. We have not established any figures on that.

Q. Are you prepared to testify that where there has been an increase in the performance of your compositions on the radio there has been a decrease in the sale of your sheet music?

A. No.

Q. Have any of the compositions published by your company become very popular over the radio in recent years?

A. Yes.

Q. Has their popularity continued or has it been short-lived?

A. Well, take the use of the "Stein Song"; that was a popular number, not a standard number; that of course is now practically obsolete, that particular number.

Q. On all the compositions published by your company do you print at the foot of the first page of the music the copyright notice required by law?

A. We do.

Q. Mr. Fischer, if you had to determine and fix the *the* [fol. 921] price to be charged for the use or rendition of your copyrighted musical compositions in each and every State of the United States, could you carry on your business?

Mr. Nye: I object to the question for the reason that it calls for speculation; no foundation.

A. In order to do it we would have to make very serious readjustments.

Q. Can you financially afford to have a man in every State of the Union to detect infringements for you?

Mr. Nye: Objected to as speculative.

A. No.

Q. Can you financially afford to retain a lawyer in every State of the Union?

Mr. Nye: Same objection.

A. The financing would be difficult unless we would have somebody to pay them.

Q. If you acting alone were required to take the various steps we have mentioned in order to protect your performing rights, could you financially carry that situation?

Mr. Nye: I object to that question as assuming a state of facts not in evidence, and calling for speculation.

A. It would be impossible to maintain any such staff [fol. 922] without in some way getting a return from somebody for the expenses of such a staff.

Q. In selling your sheet music you fix a certain price on

your music according to the name of the composer and the nature of the work and other factors, don't you?

A. There is a list price established, taking into consideration a number of factors.

Q. Does the price vary on your compositions, or is there something of a uniform price?

A. No; they vary. The catalogues are evidence of that.

Q. If you were required to determine and fix the price to be charged for all uses including the right of public performance for profit within the State of Nebraska would that affect the sale of your sheet music in the State of Nebraska?

Mr. Nye: Objected to as calling for speculation.

A. I don't know as to that. As a practical matter I don't see how you could possibly do that without disfiguring your music. You would be put to expense. Certainly it would be objected to on the part of the trade generally to have all that stamped on your copies. You would have to print separate editions, which would be an enormous expense.

[fol. 923] Q. Take your editions that you sell within the State of Nebraska, that you sell for twenty-five cents; are there such editions?

A. Yes, that is the average price for a piece of music.

Q. If in addition to the twenty-five cents you were required to determine and fix the price to be charged for all uses of the composition, including television and public performance for profit and each and every other right, and the purchaser of every sheet of music had to pay the full and complete price for all of those uses in addition to the price of the sheet music, would that affect the sale of your sheet music in the State of Nebraska?

Mr. Nye: I object to the question as calling for speculation and conclusion.

A. We would go out of business in the State of Nebraska, on that basis.

Q. How would that affect the sale of your sheet music?

A. It would add substantially to the cost of the ultimate purchase to such an extent that the ultimate purchaser would not be in a position to pay it.

Q. A good deal of your catalogue is sold for the use of the home?

A. Yes.

[fol. 924] Q. A good deal of your music is sold to music teachers?

A. Yes, music educators.

Q. Colleges and conservatories?

A. And schools.

Q. And you publish music that is purchased for school orchestras and bands?

A. Definitely.

Q. All of those people I have mentioned just now are people in the State of Nebraska?

A. Yes.

Q. Could you sell your music to those people in that State of Nebraska if in addition to the prices of the musical compositions you affixed to that price and added to it the price to be charged for the use or rendition of this copyrighted musical composition for all uses and purposes?

Mr. Nye: I object to that question on the ground that it assumes a state of facts not warranted by the evidence.

A. It would be impossible to do that. You would throw the market wide open to foreign publishers and would deprive the American publishers of a living in the State of Nebraska if you did that in the State of Nebraska.

Mr. Frohlich: Your witness.

[fol. 925] Cross-examination.

By Mr. Hotz:

Q. Have you read the Nebraska act?

A. No, not in detail.

Q. Do you receive from the American Society of Composers, Authors and Publishers something else by way of income besides public performance rights money derived from that purpose?

A. Do we receive any other money? No.

Q. The reason I ask you is because when you had that statement before you you said it included some other figures.

A. Yes, ASCAP check and other money.

Q. What did you mean?

A. Permission granted to some other people to use our music for synchronization purposes.

Q. That has nothing to do with ASCAP?

A. No, that has nothing to do with ASCAP.

Q. You did grant permission to use your copyrighted music to others for public performance rights by fixing a sum of money to be paid for that purpose, by arrangement?

A. We only do that in the case of grand rights, so-called grand rights, and that is the best illustration, so-called symphonic works, a work that is not published for sale.

[fol. 926] Q. Used largely for public performances?

A. Used largely for public performances by the symphony people.

Q. In those instances you charge so much for that right and get your money right on the spot?

A. It is charged to the management and it is collected from the management.

Q. What I am getting at, it is one charge you make?

A. In some instances it is two charges; sometimes they give a second performance; if they give a second performance there is a second charge.

Q. So you charge for each performance?

A. Yes.

Q. Is that practice standard with you?

A. That varies with the class of music. There are "A" symphonies and "B" symphonies. It varies. There is also the first performance of a work.

Q. In regard to your deal with ASCAP as to public performance rights of your music, the American Society of Composers, Authors and Publishers fixes and determines the price that the user shall pay for public performance rights within the State of Nebraska?

A. Yes.

Q. In all these catalogues that have been introduced in [fol. 927] evidence of those musical compositions, vocal and instrumental, the copyrights are owned by you, are they not—that is, by your firm?

A. Yes.

Q. You own them and also certain renewal rights in reference to them?

A. Yes.

Q. Approximately how many are there, would you say?

A. I don't know. I have never counted them. It is an enormous repertoire.

Q. But it shows in the catalogues here?

A. Yes.

Q. Do you know how the ASCAP fixed the price that shall be paid to you?

A. Yes, definitely.

Q. How do they do it?

A. The net distributable income of the ASCAP is divided into two parts; half is allocated to the publishers, the other half is the composers' and authors' share. The publishers' share is distributed in the following manner: There is what is known as seniority rating. Part of that goes on the seniority rating of the concern. Part of it is distributed according to surveys made of the performances, and the balance is distributed by a committee which takes into consideration the contribution made by the individual publisher to the ASCAP repertoire.

Q. You are a member of the board of ASCAP?

A. I am.

Q. What percentage would you say of the music copyrighted, vocal and instrumental music there is in the United States that ASCAP handles in the manner such as you have mentioned?

Mr. Finkelstein: Objected to, no foundation; speculation.

A. Of what?

Q. Total of all copyrighted music, vocal and instrumental?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial, calling for speculation, no foundation laid.

(The pending question was read by the stenographer.)

A. About ninety per cent, I should say. Of course, I have no definite way of knowing.

Q. That is your best estimate as a member of the board of directors of the American Society of Composers, Authors and Publishers and as a publisher, one of the largest publishers?

[fol. 929] A. Yes, that would be my estimate.

Q. How many publishers, reputable, established publishing houses, are there that are members of ASCAP?

A. How many?

Q. Yes.

A. In all?

Q. Yes.

A. Well, I should say about ninety. How many are there? I don't know.

Q. In the bill of complaint that was filed by the attorneys for the Society, it was 123; is that right?

A. I guess that is right.

Q. That group that are members of ASCAP constitute substantially all of the publishers of consequence in the United States?

A. Yes, I should say so; I know of no important publisher that is not in it.

Q. In each instance, from your experience as a member of the board of directors of the American Society and as a publisher, the price for the public performance rights is fixed by ASCAP, your Society?

A. Yes, the license.

Q. The price for that user?

A. Yes, for the right to use the repertoire of ASCAP.

[fol. 930] Q. How many members of the board of directors are there from the publishers?

A. The number of publisher members is twelve publisher members; it is in the constitution.

Q. Besides yourself who are the other eleven that are on that board?

A. There are only eleven just now. Mr. Gustave Schirmer.

Q. Would you mind giving just what he is, his connection?

A. Of G. Schirmer, Inc. George Fischer, J. Fischer & Brother. Saul Bornstein, of Irving Berlin, Inc. Louis Bernstein of Shapiro, Bernstein & Co. Jack Bregman. Leo Feist, of Leo Feist, Inc. Will Von Tilzer, Broadway Music Company. Jack Mills, Mills, Inc. Max Dreyfus, Chappell & Company. Walter Douglas. What is Douglas' firm name now? Donaldson, Douglas & Gumble. Edwin H. Morris of Witmark. That takes care of the eleven, doesn't it?

Q. Yes. They are, I presume, among the largest publishing houses, the men you have given, they are very substantial firms?

A. Yes; generally speaking, they are representative of the industry.

Q. They all have catalogues similar to those that have been introduced here as Exhibit 7? I call your attention [fol. 931] to Exhibit 7 (shown to witness), consisting of thirteen books, which are a list of your musical composi-

tions which you have copyrighted and own. Do all of the publishing houses have a catalogue of musical compositions?

A. They all have catalogues of music, yes.

Q. They are printed and available for public use, that is, for persons to look at or buy from if they wish?

A. I don't think so; I don't think they all print their catalogues. The popular publisher doesn't print his catalogues as a rule.

Q. What do they have?

A. They print bulletins. They have no need of permanent catalogues. Schirmers and George Fischers is similar to ours.

Q. They are recorded in the form of typewritten sheets or something of that sort?

A. They are all filed with ASCAP in typewritten form.

Q. They are all filed and are available for use?

A. Let me make that perfectly clear. It is my understanding that the popular publisher does not distribute a catalogue the way a standard publisher does. He has no use for it.

Q. The popular music goes out too fast?

A. Yes.

Q. Are you familiar with the income of ASCAP?
[fol. 932] A. Yes.

Q. How much was it for 1937; do you remember?

A. I don't know definitely.

Q. I could get that definitely from them, but you, being on the board of directors, you would know.

A. I would hate to quote figures without having them before me.

Q. Approximately what was it?

A. Net distributable revenue?

Q. Yes.

Mr. Finkelstein: That is objected to as incompetent, irrelevant and immaterial.

A. \$2,000,000,—I wouldn't want to say that definitely.

Q. What were ASCAP's expense items; what is their overhead?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

Mr. Hotz: I am asking for what it is; I am not asking for the nature.

Q. What is it?

A. It is the operation of the staff, the executive offices in the National Broadcasting Building, its field force; it has a very substantial operation in connection with the distribution of the money, allocating to the various catalogue [fol. 933] performances, it has a very substantial staff in that connection, and it also has its field managers.

Q. You don't know how much their overhead is?

A. I know roughly it is about twenty per cent of the total income. I wouldn't attempt to testify to figures from memory. I would have to have them.

Q. Do you know what the men are paid out in the field such as their representative in Nebraska, for instance; is he on a salary or does he get a certain percentage of public performance rights that is taken in?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. I don't know.

Q. Do you know how it is in New York, for example?

A. I am not definite here in New York; I think they are all salaries here in New York.

Q. What is Mr. Buck's salary?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. \$30,000.

Q. What is Mr. Mills'?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. Forty.

[fol. 934] Q. And Paine's?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

Q. That is \$40,000?

A. I think Paine's is \$22,500; I would have to check that to see if it is correct.

Q. Those three men are the ones who are really in charge of the operations of ASCAP?

A. Yes, that is right.

Q. Do the directors get any salary?

A. No.

Q. Then, does Mr. Buck also have an income from ASCAP from performance rights?

A. Yes.

Q. Do you know what it is?

A. I do not.

Q. Do you know whether Mills or Paine have?

A. I know definitely they have not.

Q. Who receives the largest amount of money paid by ASCAP for public performance of copyrighted works among the composers?

Mr. Finkelstein: That is objected to as incompetent, irrelevant and immaterial.

A. Among the publishers?

[fol. 935] Q. No, composers?

A. I don't know.

Q. Do you know what the top amount is that is paid to any composer?

A. No.

Q. Do you know the top amount that is paid to any publisher?

A. I know who gets the highest amount.

Q. Is it Harms?

A. It is Harms.

Q. How much is it?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. I don't know; I don't get the figures for the other publishers.

Q. Who fixes the amounts that are paid to the various publishers and composers and authors; how is that done?

Mr. Finkelstein: That is objected to as incompetent, irrelevant and immaterial.

A. The amounts paid to the various publishers and authors?

Q. Yes.

A. The amounts paid to the various publishers is determined as I have explained before, by an allocation of the distributable amount.

[fol. 936] Q. Who does that?

Mr. Finkelstein: That is objected to as incompetent, irrelevant and immaterial.

A. What?

Q. What men?

Mr. Finkelstein: That is objected to as incompetent, irrelevant and immaterial.

A. The management; the distribution proportion is determined by the board and the management makes the distribution.

Q. The board itself makes the allocation?

A. The formula, as I have explained.

Q. And they all sit in on that; and they have something to say about that when it is discussed?

A. The formula? That is correct; that is agreed to.

Q. By the management you mean Mr. Buck, Mr. Paine and Mr. Mills?

Mr. Finkelstein: I object to that as incompetent, irrelevant and immaterial; assuming a state of facts not in evidence.

A. I imagine Mr. Paine as manager supervises that distribution.

Q. How long has Mr. Paine been identified with ASCAP?

A. A little over a year.

[fol. 937] Q. He is a new man?

A. He is a new man.

Q. Was he added to the staff, or did he take someone else's place?

A. He was added to the staff.

Q. What had been his business before?

A. Previous to that he was the manager of the Music Publishers Protective Association.

Q. What was that?

A. That was an association made up principally of popular music publishers, which functioned in the interest of popular music publishers.

Q. Did they have anything to do with public performance rights?

A. No.

Q. ASCAP has always had that in charge?

A. Trade practices chiefly they were concerned with.

Q. The Music Publishers Protective Association did nothing by way of granting licenses?

A. No; for performance, no.

Q. Did the organization do anything for licensing under the copyright act?

Mr. Finkelstein: I object to that as incompetent, irrelevant and immaterial.

[fol. 938] A. The organization itself did nothing, but Mr. Paine acting as agent and trustee for a number of publishers granting electric synchronization rights.

Q. Who fixed the price of those synchronization rights?

Mr. Finkelstein: I object to that as incompetent, irrelevant and immaterial.

A. The publishers themselves.

Q. Who fixed the price in connection with electrical transcription?

Mr. Finkelstein: That is objected to as incompetent, irrelevant and immaterial.

A. The publisher also.

Q. You were a member of the board of directors of the Music Publishers Protective Association in 1931?

Mr. Finkelstein: I object to the question as incompetent, irrelevant and immaterial, argumentative, and has no bearing on this case.

A. Yes, I was.

Q. For how long?

A. I don't remember; I was on and off that board, I think, for a number of years.

Q. Has that organization gone out of business?

Mr. Finkelstein: I object to that as incompetent, irrelevant and immaterial.

[fol. 939] A. I don't think so.

Q. Were you present in 1931 when the discussion came up as to license fees for electrical transcription?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial; assumes a state of facts not in evidence.

A. I imagine I was present at some of the discussions.

Q. You knew that the problems were before that board?

A. Yes.

Q. Did they make any agreement as to fees?

Mr. Finkelstein: I object to that as incompetent, irrelevant and immaterial.

A. Fees were suggested.

Q. Were they carried out?

A. I don't know just what the ultimate fee was. Electrical transcription, it was twenty-five to fifty cents per use; I don't recall the details of that.

Q. In connection with the public performance rights there would be nothing from the standpoint of mechanical work or printing that would prevent your organization, by agreement with the composer, of course, fixing the public performance rights on a piece of sheet music when it was sold, by having it stamped on there; you could stamp it on there if you and the composer wished?

[fol. 940] A. You couldn't, without mutilating the copy.

Q. Wouldn't it mean that the sale of this music carries with it public performance rights, wouldn't that be all that was necessary?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. I wouldn't know as to that. Would that be all that was necessary? It would be physically possible.

Q. That could be done?

A. That statement could be put on the music physically.

Q. And the only persons that are interested in those public performance rights to begin with are the composer and the publisher; those are the two persons, the composer and the publisher, aside from the user?

A. Generally, yes.

Q. If the composer at the time you took over his work made a deal with you that he was agreeable, it could be done?

Mr. Finkelstein: I object to the question as incompetent, irrelevant and immaterial, and hypothetical.

A. If we could determine a price, physically it could be printed on the copy. It might mutilate the copy; it might call for remaking our title pages.

[fol. 941] Q. I am talking about the future.

A. Yes, physically it could be done.

Q. You could arrange with the composer in consultation with yourself what price to charge?

A. No, not practically, because there is no way of determining what price is a fair price.

Q. The members of the board of directors of the Music Publishers Protective Association, up until 1934 or thereabouts, were about the same or constituted the same men as were on the board of directors representing the publishers on ASCAP?

Mr. Finkelstein: I object to that question as incompetent, irrelevant and immaterial; assuming a state of facts not in evidence, and refers to a state of facts prior to the passage of this statute.

A. If you could tell me who the board was at that time. There were undoubtedly members on the ASCAP board at that time. I don't know who constituted the board at that time.

Q. You don't recall?

A. No.

Q. You signed some interrogatories, did you not?

A. I did.

Q. Who fixes the prices of licenses to manufacturers for [fol. 942] electrical transcriptions by the Publishers Protective Association?

Mr. Finkelstein: I object to that question as incompetent, irrelevant and immaterial; assumes a state of facts not in evidence.

A. Who fixes the prices?

Q. Yes.

A. I guess a group of publishers discuss the matter and come to some sort of general conclusion as to what the prices should be, and they more or less vary from twenty-five to fifty cents, according to my recollection.

Q. Where do those discussions take place?

A. The discussions that I was present at I think took place in the office of the Music Publishers Protective Association.

Q. Has that work been taken over, that is, the work that was previously done by the Publishers Protective Association, has that been taken over by ASCAP?

A. No.

Q. They have nothing whatever to do with it?

A. No. As a matter of fact, it wasn't done by M. P. P. A.;

it was done by Mr. Paine who was acting as agent and trustee for a group of publishers.

Q. Paine was chairman of the board of directors of [fol. 943] the Music Publishers Protective Association in 1930 and 1931, was he not?

A. Yes.

Q. And at the meeting of the board of directors, of which you were one, of the Music Publishers Protective Association, fixed these prices that were charged for electrical transcription, that is, for each record manufactured fifty cents for the individual records and twenty-five cents for each of the popular numbers; is that right; do you recall that?

Mr. Finkelstein: I object to the question as incompetent, irrelevant and immaterial.

A. My recollection is that it was twenty-five cents minimum price and the fifty cent price for numbers that we considered, each individual publisher might consider as outstanding.

Q. At that time you were familiar with the copyright act in connection with the two-cent rate for manufacturing?

A. Yes. You mean the compulsory act?

Q. Yes.

A. Yes.

Q. There is one more question along that line, Mr. Fischer, and that is, whether these prices were fixed, twenty-five cents and fifty cents, for the manufacture of electrical [fol. 944] transcriptions, were arranged for and determined at the board of directors' meeting of the Publishers Protective Association.

A. I don't remember whether it was determined by the directors' meeting or at a meeting of the publishers held at the M. P. P. A. office; I don't recall that that was a directors' meeting; I don't think it was a directors' meeting.

Q. How many members did they have; do you remember?

Mr. Finkelstein: I object to the question as incompetent, irrelevant and immaterial.

A. I don't remember.

Q. Do you know who the members of the board of directors now are of the Publishers Protective Association?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. No.

Q. You don't know that. Are you a member of that organization now, at the present time?

A. No.

Q. Has it ceased to function?

A. I believe it is still in existence. I know it is still in existence.

Q. What is its purpose?

[fol. 945] Mr. Finkelstein: I object to the question as incompetent, irrelevant and immaterial.

A. I think the popular publishers still feel the need of a trade organization to regulate trade practices.

Q. Those prices are still maintained; that is, the prices for electrical transcription, that were fixed in 1930 or 1931 and adopted, are still maintained and are the prices that you now get?

Mr. Finkelstein: I object to the question as incompetent, irrelevant and immaterial; no foundation laid; assumes a state of facts not in evidence.

A. So far as our catalogue is concerned, yes.

Q. What is your knowledge of the other publishers?

A. I have no knowledge of the other publishers.

Q. As a member of the board of directors of the American Society of Composers, Authors and Publishers do you know what is being charged to the users in the State of Nebraska for the different uses?

A. I can't recall. The matter has been discussed, but I can't tell you just now what our revenue is.

Q. I have in mind the fixing of the fee that is paid by the user.

A. What kind?

[fol. 946] Q. The different users, for instance, hotels.

A. The hotel is charged for the use they make of the music. Motion picture houses are charged on the basis of seating capacity.

Q. In Nebraska; we are speaking of Nebraska.

A. Yes. I have never negotiated the contracts.

Q. That is not your job to negotiate the contract?

A. I never examined the contract; I know only the policy generally which would be applied to Nebraska.

Q. And radio stations are also fixed and determined at a fee that the board passed upon?

A. The formula as determined by the board is a sustaining fee and a standard fee.

Q. That is for the public performance of copyrighted vocal and instrumental musical compositions?

A. It is for public performance of the entire repertoire of ASCAP; it is not confined necessarily to that kind of music.

Q. And that repertoire of ASCAP I think you said constitutes ninety per cent of the music in the United States?

Mr. Finkelstein: I object to the question as contrary to the witness's testimony. There is no statement that it constitutes ninety per cent of all music in the United States; [fol. 947] the witness made no such statement.

Mr. Hotz: The record will speak for itself.

A. I said copyrighted music.

Q. Mr. Fischer, as president of one of the largest and oldest publishing houses in the United States would you state that substantially all of the sheet music which is in such form that it can be performed by commercial users is copyrighted?

A. Substantially?

Q. Yes.

A. No. I would make no such statement. There is a tremendous amount of public domain material.

Q. I am talking about sheet music for commercial usage.

A. I don't know what you mean by commercial usage. You speak of sheet music as applied to commercial usage. I would say there was a tremendous amount of sheet music of old classics.

Q. Arranged for public performance?

A. You said sheet music. We distinguish. There is also a large amount of available material in orchestra and band form.

Q. And that is copyrighted?

A. Some of it.

[fol. 948] Q. The arrangement is copyrighted?

A. The original editions are not copyrighted.

Q. It wouldn't do the user very much good unless he had them orchestrated?

A. The original is in the public domain and that is available to him as well as it is to us.

Q. Who does the orchestration work?

A. You mean, who makes orchestra arrangements?

Q. The publishing houses do?

A. The publishing houses have their own staff.

Q. And when they do that work it is copyrighted, isn't it?

A. The arrangement is copyrighted.

Q. And everything that you publish and sell is copyrighted, isn't it?

A. Oh, no.

Q. What percentage would you say of your works is not?

A. A very large percentage of it is in the public domain. The copyright has expired. A lot of it was not copyrighted. Our editions of the classics were not copyrighted.

Q. All arrangements that you have made of orchestrations were copyrighted?

A. Originally, but many of the arrangements were not renewed. Our concern has been in existence for a great many years.

[fol. 949] Q. In a large number of instances there have been new arrangements?

A. Not in a large number; in some instances.

Q. When it becomes popular and the publisher wants it then, of course, you make your arrangement and have it copyrighted, isn't that true?

A. Are you talking about re-arrangements or arrangements?

Q. Rearrangements.

A. We wouldn't be dependent on that. It would depend on a lot of other factors,—as to whether the old arrangements were meeting present day requirements or not.

Mr. Hotz: I think that is all.

Redirect examination.

By Mr. Frohlich:

Q. You gave some testimony, Mr. Fischer, about the Society membership owning ninety per cent of the copyrighted music?

Mr. Nye: You are speaking now of the American Society of Composers, Authors and Publishers?

Mr. Frohlich: Yes, I am speaking of the members of the American Society of Composers, Authors and Publishers.

A. Yes, I did.

[fol. 950] Q. Was that based on any definite knowledge that you possess?

A. In my opinion only; it was my opinion.

Q. It was a pure guess?

A. More or less.

Q. Did you ever make an investigation in the copyright office yourself to see if there were other copyrights that were owned by parties that were not members of the Society?

A. No. Of course, if I had in mind the compositions that were published by individuals, a great many of those—I recently was very much surprised to see how many individual writers copyright and publish their own works—I had reference to the repertoire that was in use and was of value. I don't know how many works are published annually by composers. There are a great many, I know that.

Mr. Hotz: That have no particular commercial value?

The Witness: That have no great commercial value.

Q. You yourself never made any investigation in the Copyright Office with reference to these entries?

A. No, but an investigation was made several years ago and the result of that investigation was amazing as to how [fol. 951] many works were published by individuals.

Q. Those compositions that were published by individuals not members of ASCAP, are available for public performance for profit?

Mr. Nye: I object to the question as calling for a conclusion of law.

A. I was going to say that they have the performing rights. Whether they could commercialize it, I don't know. I doubt that they could.

Q. Did you ever participate in any negotiations between the Society and the Hotel Men's Association?

A. Yes.

Q. Can you tell us the first year you participated in that negotiation?

A. I was present at a number of negotiations.

Q. Did you have any participation in recent years in any such discussion?

A. As a member of the board of ASCAP, yes.

Q. Was there a conference between the Hotel Men's Association and the members of ASCAP?

A. Yes.

Q. Did you participate in it?

A. Yes.

Q. Were there discussions with respect to the use of per-[fol. 952] formance rights of members of the Society in hotels throughout the country, at those conferences?

A. Yes.

Q. Was there a discussion of the rates to be paid by the hotels for public performance for profit of the compositions of members of the Society?

A. Yes.

Q. Did you participate in the negotiations that led up to an agreement with respect to such rate?

A. Some of the preliminary discussions, yes.

Q. Did the Hotel Men's Association's representatives, in these discussions, make offers with respect to what they thought was the correct price for the use of these compositions?

Mr. Nye: Objected to as calling for a conclusion, hearsay, not the best evidence.

Q. In your presence?

A. I don't remember the details of those discussions.

Q. Who represented the Hotel Men's Association in these discussions, do you recall?

Mr. Nye: Objected to as immaterial, not the best evidence.

A. There was a committee; I don't recall the names.

Q. Was Mr. Bowman on the committee?

[fol. 953] A. I think so, yes.

Q. In these discussions were the rates discussed?

A. Yes.

Mr. Nye: Objected to as calling for a conclusion.

Q. Was there a rate finally reached, satisfactory to the Society and the Hotel Men's Association?

Mr. Nye: Objected to as calling for a conclusion.

A. Contracts were finally negotiated and the rates must have been finally satisfactory to both parties.

Mr. Nye: I move to strike out, "the rates must have been satisfactory," as not responsive.

Q. Did these representatives of the Hotel Men's Association purport to deal on behalf of all the hotels in the United States?

Mr. Nye: Objected to as calling for a conclusion.

A. No, I believe they purported to negotiate for the Hotel Men's Association; I don't know whether they had a blanket power to represent all hotels.

Q. Did they purport to deal as representative members of the Hotel Men's Association?

Mr. Nye: Same objection.

[fol. 954] A. Yes. They had a very able attorney present.

Mr. Nye: I object to the voluntary statement of the witness and move to strike it out as not responsive.

Q. Who was their attorney?

A. I don't remember his name.

Q. Did you personally participate in any discussions with the representatives of the motion picture exhibitors?

A. No.

Q. Did you personally participate in any discussions with the representatives of the radio users?

A. Yes.

Q. How recent was the last participation?

A. About four years ago, three or four years ago.

Q. Was that in a conference between members of the board of directors of the Society and the radio people?

A. I think it was a conference between a committee appointed by the board and the committee appointed by the National Broadcasters Association.

Mr. Nye: I object to the question as calling for a conclusion, no foundation of the knowledge of the witness.

Q. Do you recall who represented the Radio Broadcasters?

[fol. 955] A. No, I don't remember the names.

Q. Were you a member of the committee representing ASCAP in that discussion?

A. Yes, I was.

Q. Did you discuss the rates with them?

A. Yes.

Q. Did you participate in any discussions between members of ASCAP and any other trade association of users?

A. No.

Q. Do you know whether there were any conferences or discussions with members of trade associations and ASCAP outside of the radio people, outside of the Hotel Men's Association and outside of the Motion Picture Exhibitors?

Mr. Nye: I object to the question as immaterial.

A. No.

Mr. Finkelstein: That is all.

Recross-examination.

By Mr. Hotz:

Q. These men that were there representing these various organizations are large users of music, are they not?

A. Yes.

Q. Hotels, radio stations and others?

[fol. 956] A. Yes.

Q. And what they were there for largely was kicking on the prices, protesting on the amount of money that was being charged to them as users?

Mr. Finkelstein: Objected to as incompetent and immaterial.

A. That would be natural in any negotiation; the buyer always wants to cut the price down and the seller wants to get it up; that would be perfectly natural.

Q. They had no alternative; there was no similar society such as the American Society of Composers, Authors and Publishers?

Mr. Frohlich: That is objected to, arguing a question of law with the witness.

A. There are other publishers' associations in the field.

Q. What are they?

A. Associated Music Publishers, Sesac, and I think there is another society; there are similar organizations in the field.

Mr. Hotz: That is all.

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